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## Giving Arbitration Some Credit: The Enforceability of Arbitration Clauses Under the Credit Repair Organizations Act

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# **GIVING ARBITRATION SOME CREDIT: THE ENFORCEABILITY OF ARBITRATION CLAUSES UNDER THE CREDIT REPAIR ORGANIZATIONS ACT**

*Genevieve Hanft\**

*In today's economy, the effects of a bad credit report are devastating to consumers. Individuals with poor credit history are often crippled in their ability to purchase even the smallest item, and consequently turn for help to credit repair organizations advertising services that cure bad credit. Frequently, however, these organizations merely accept high fees from customers already in dire financial straits, without improving their financial standing. To combat these predatory practices, Congress passed the Credit Repair Organizations Act (CROA), which imposes several requirements on credit repair organizations. One such provision mandates that credit repair organizations give a form to each consumer that clearly explains their specific rights before any contract is signed. This required disclosure form notifies consumers that they have "the right to sue" a credit repair organization that violates any provision of the CROA. References to this right, however, appear nowhere else in the statute.*

*Many credit repair organizations include mandatory arbitration clauses in their contracts with consumers. As a result, consumers who have received a form notifying them of a "right to sue" may be told, by both companies and courts, that they may not seek redress in a court of law. Circuit courts have split on the enforceability of these arbitration agreements.*

*In the context of both consumer protection law and recent arbitration jurisprudence, this Note examines the purported collision between the CROA and the longstanding Supreme Court policy in favor of enforcing arbitration agreements pursuant to the Federal Arbitration Act. After examining the passage of the CROA and the history of arbitration as a mechanism for dispute resolution, this Note analyzes the divergent approaches taken by the U.S. Courts of Appeals for the Third, Ninth, and Eleventh Circuits in addressing this conflict. Ultimately, this Note*

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\* J.D. Candidate 2012, Fordham University School of Law; B.A. 2009, Bowdoin College. I would like to thank Professor Jacqueline Nolan-Haley for her guidance and all my friends and family, especially my grandparents and step-parents, for their patience, love, and support. Special thanks to Mom, Dad, Ali, and Liz for their endless confidence in me.

*recommends that courts enforce these arbitration clauses in order to preserve the viability of arbitration as an effective method of dispute resolution.*

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## INTRODUCTION

In 2001, Richard Schreiner faced massive debt obligations.<sup>1</sup> At a loss for how to fix it on his own, Schreiner contacted Credit Advisors, Inc., a business offering debt management services.<sup>2</sup> He signed an agreement with the company to resolve his \$15,392 debt in exchange for monthly payments of \$400.<sup>3</sup> After five years of these monthly payments, Schreiner still owed over \$5000 of his original debt.<sup>4</sup>

Believing that Credit Advisors had deceived him, Schreiner decided to bring his claims to court.<sup>5</sup> He filed suit in the United States District Court for the District of Nebraska<sup>6</sup> for violations of the federal Credit Repair Organizations Act (CROA).<sup>7</sup> But Schreiner never got his day in court.<sup>8</sup> The agreement he had signed with Credit Advisors contained an arbitration

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1. *See* Schreiner v. Credit Advisors, Inc., No. 8:07CV78, 2007 WL 2904098, at \*1 (D. Neb. Oct. 2, 2007).

2. *See id.*

3. *See id.*

4. *See id.* at \*3.

5. *See id.* at \*4.

6. *See id.*

7. *See* 15 U.S.C. § 1679 (2006).

8. *See* Schreiner, 2007 WL 2904098, at \*12.

agreement, and the district court issued an order compelling Schreiner to submit his claims to arbitration.<sup>9</sup>

In urging the court to deny arbitration and allow him to bring his claims in court, Schreiner pointed to a provision in the CROA that informs customers of credit repair organizations that “[y]ou have a right to sue a credit repair organization that violates the Credit Repair Organization[s] Act.”<sup>10</sup> How could it be possible, argued Schreiner, that he could be barred from court when the statute under which he was suing specifically informed him that he had a right to sue?<sup>11</sup>

The answer lies in the perceived conflict between the Federal Arbitration Act (FAA)<sup>12</sup> and the CROA. The FAA requires courts to enforce arbitration agreements “save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>13</sup> The U.S. Supreme Court has interpreted the FAA as manifesting a “liberal federal policy favoring arbitration agreements” and has consistently compelled arbitration of a diverse array of claims.<sup>14</sup> But what of the CROA’s declaration of a “right to sue?”

This Note addresses the unresolved question of the enforceability of arbitration agreements under the Credit Repair Organizations Act. While the U.S. Courts of Appeals for the Third and Eleventh Circuits have enforced such agreements, finding that the CROA does not preclude arbitration,<sup>15</sup> the U.S. Court of Appeals for the Ninth Circuit has refused to enforce these arbitration clauses, finding that the CROA entitles plaintiffs to a judicial forum.<sup>16</sup>

This conflict arises against a backdrop of debate over all mandatory arbitration agreements between consumers and businesses.<sup>17</sup> Scholars and legislators alike have argued that such agreements are unjust.<sup>18</sup> A refusal to

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9. *See id.*

10. *See id.* at \*9–10; *see also* 15 U.S.C. § 1679c(a).

11. *See Schreiner*, 2007 WL 2904098, at \*10–11.

12. 9 U.S.C. §§ 1–16 (2006).

13. *Id.* § 2.

14. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *see also infra* Part II.C–D.

15. *See, e.g., Picard v. Credit Solutions, Inc.*, 564 F.3d 1249, 1256 (11th Cir. 2009); *Gay v. CreditInform*, 511 F.3d 369, 395 (3d Cir. 2007).

16. *See, e.g., Greenwood v. CompuCredit Corp.*, 615 F.3d 1204, 1205 (9th Cir. 2010).

17. *See generally* Richard M. Alderman, *Why We Really Need the Arbitration Fairness Act: It’s All About Separation of Powers*, 12 J. CONSUMER & COM. L. 151 (2009); Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 LAW & CONTEMP. PROBS. 133 (2004); *infra* Part III.B.3.

18. *See generally* Senator Russell D. Feingold, *Mandatory Arbitration: What Process is Due?*, 39 HARV. J. ON LEGIS. 281 (2002); Shelly Smith, *Mandatory Arbitration Clauses in Consumer Contracts: Consumer Protection and the Circumvention of the Judicial System*, 50 DEPAUL L. REV. 1191 (2001); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631 (2005).

enforce such agreements, however, would fly in the face of the Supreme Court's clear mandate to lower courts to enforce arbitration agreements.<sup>19</sup>

This Note examines the current circuit split over the enforceability of arbitration agreements under the CROA in the context of both consumer protection law and relevant arbitration jurisprudence. Part I discusses the development of consumer protection law and the enactment of the CROA and examines the statute in detail. Part II describes the history and procedure of arbitration and examines the development of the Supreme Court's policy regarding arbitration. Part III then analyzes the circuit split over the enforceability of arbitration agreements under the CROA and the arguments for and against enforcing mandatory consumer arbitration clauses. Part IV advocates for the enforcement of such arbitration clauses, presenting several reasons why consumers are not harmed by the enforcement of such agreements. Finally, Part IV proposes a simple solution to the problem: the elimination of credit repair organizations.

### I. THE CREDIT REPAIR ORGANIZATIONS ACT

This part introduces the origins and developments of consumer protection law. Next, it discusses the passage of the CROA and examines the CROA in detail. Finally, it highlights comparable statutes enacted under state law.

#### A. *From Caveat Emptor to Meaningful Disclosure: The Origins and Development of the Consumer Protection Movement*

The American legal system has provided protection to consumers for centuries, albeit not always in the form of a comprehensive, effective legal framework.<sup>20</sup> The common law protected consumers by applying to consumer disputes legal principles such as warranty obligations stemming from a contractual relationship and deceit actions grounded in tort law.<sup>21</sup> Any government involvement in consumer issues generally flowed from a desire to maintain market stability.<sup>22</sup>

Statutory protection of consumers began with the establishment of the Federal Trade Commission (FTC) in 1914.<sup>23</sup> Originally enacted to monitor only "unfair methods of competition," Congress amended the Federal Trade

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19. See generally Thomas E. Carbonneau, *Arguments in Favor of the Triumph of Arbitration*, 10 CARDOZO J. CONFLICT RESOL. 395 (2009) [hereinafter Carbonneau, *Triumph*]; Thomas E. Carbonneau, *The Revolution in Law Through Arbitration*, 56 CLEV. ST. L. REV. 233 (2008) [hereinafter Carbonneau, *Revolution*]; Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute [Mandatory] Arbitration Outlived Its Welcome?*, 40 ARIZ. L. REV. 1069 (1998).

20. See Robert B. Reich, *Toward a New Consumer Protection*, 128 U. PA. L. REV. 1, 5 (1979) ("The American economy has paid lip service for two hundred years to the twin laissez-faire principles of vigorous competition and consumer self-reliance, the latter embodied in the maxim *caveat emptor*.").

21. See JOHN A. SPANOGLE ET AL., CONSUMER LAW: CASES AND MATERIALS 1 (3d ed. 2007).

22. Reich, *supra* note 20, at 9.

23. See 15 U.S.C. §§ 41–58 (2006); SPANOGLE ET AL., *supra* note 21, at 35.

Commission Act in 1938 to extend the Act's scope to cover "unfair or deceptive acts or practices."<sup>24</sup> Subsequently, American consumer protection law underwent an expansion in the 1960s.<sup>25</sup> Currently, this area of the law reflects an amalgamation of principles from contract, tort, criminal, property, business, corporate, constitutional, and civil rights law.<sup>26</sup>

### 1. Truth in Lending Act

From 1950 to 1980, the amount of credit extended to individuals by financial institutions increased nearly fifteen fold.<sup>27</sup> With this expansion in the use of credit,<sup>28</sup> the law began to provide comprehensive protection to consumers in various aspects of credit transactions, most notably with the enactment of the Truth in Lending Act (TILA) in 1968.<sup>29</sup> TILA is a section of the Consumer Credit Protection Act (CCPA), the purpose of which is to provide meaningful disclosure of credit terms to consumers.<sup>30</sup> TILA was the first federal law aimed at protecting consumers in obtaining credit,<sup>31</sup> and the law was thought to improve the inadequacies of consumer protection at the state level.<sup>32</sup> Consumer protection at the federal level has continued to expand since TILA's passage, with the enactment of numerous federal statutes designed to protect consumers from deceptive practices.<sup>33</sup>

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24. See 15 U.S.C. § 45; SPANOGLE ET AL., *supra* note 21, at 35.

25. See Alderman, *supra* note 17, at 152 n.16 (arguing that consumer protection was "[l]imited" until the 1950s and early 1960s, when President John F. Kennedy outlined four basic consumer rights in an address to Congress); see also Mark E. Budnitz, *The Development of Consumer Protection Law, the Institutionalization of Consumerism, and Future Prospects and Perils*, 26 GA. ST. U. L. REV. 1147, 1151 (2010) (discussing how the expansion of consumer protection law occurred as a result of the civil rights movement and the effort by lawyers to alleviate poverty).

26. See RONALD D. COLEMAN, AMERICAN BAR ASSOCIATION, GUIDE TO CONSUMER LAW 4-9 (1997).

27. See DAVID G. EPSTEIN, CONSUMER LAW IN A NUTSHELL 40 (2d ed. 1981).

28. See JOAN M. BURDA, AN OVERVIEW OF FEDERAL CONSUMER LAW 5 (1998) ("[C]redit is no longer a luxury but a necessity . . . . The credit industry is a multibillion-dollar operation, and credit permeates every facet of daily life.").

29. 15 U.S.C. §§ 1601-1667f; see H.R. REP. NO. 90-1040, at 3 (1967), *reprinted in* 1968 U.S.C.C.A.N. 1962, 1965 ("Consumer credit has become an essential feature of the American way of life.").

30. See 15 U.S.C. §§ 1601-1693r.

31. See *id.* § 1601(a) (describing the purpose of the Truth in Lending Act (TILA) as "assur[ing] a meaningful disclosure of credit terms so that the consumer will be able to . . . avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices").

32. See Budnitz, *supra* note 25, at 1154.

33. See generally BURDA, *supra* note 28 (excerpting and discussing numerous consumer protection statutes, for example the Fair Credit Billing Act, 15 U.S.C. §§ 1666-1666j); Alderman, *supra* note 17, at 152.

## 2. Fair Credit Reporting Act

Numerous problems and inconsistencies in the credit business arose with the increased use of credit.<sup>34</sup> The credit reporting industry became increasingly important, given that obtaining a credit report on each loan applicant is a prerequisite to lending.<sup>35</sup> Therefore, an inaccurate or unfavorable credit report came to be potentially devastating to consumers.<sup>36</sup> Common law, however, provided little protection to those who were injured by an inaccurate credit report.<sup>37</sup> As a result, Congress enacted the Fair Credit Reporting Act (FCRA)<sup>38</sup> in 1970 “to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer’s right to privacy.”<sup>39</sup> The FCRA sought to regulate consumer reporting agencies<sup>40</sup> and provided consumers with the right to dispute incorrect information about their credit history.<sup>41</sup> The Act thus gives consumers the right to access their credit file after being denied credit based on information from a credit report.<sup>42</sup>

Upon receiving a claim from a consumer disputing the accuracy of her report, an agency must conduct a “reasonable reinvestigation” free of charge to the consumer.<sup>43</sup> Usage of inaccurate information is a violation of the FCRA.<sup>44</sup> Nevertheless, although designed to combat “unfair credit reporting methods,”<sup>45</sup> the FCRA instead created a new loophole for questionable business practices—and a new channel by which consumers’ credit may be damaged—by enabling the operation of credit repair organizations.<sup>46</sup>

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34. See EPSTEIN, *supra* note 27, at 213 (attributing the increase in consumer credit to a greater supply of “high priced items that a consumer could use while paying for them”).

35. See *id.* at 53–55.

36. See 136 CONG. REC. 18,766 (1990) (“Consumers with bad credit histories can find it impossible to borrow to buy a car, purchase a home, or even . . . to rent an apartment.”) (statement of Rep. Annunzio).

37. See EPSTEIN, *supra* note 27, at 55–57 (discussing why consumers rarely triumphed in common law causes of action disputing an inaccurate credit report); see also SPANOGLE ET AL., *supra* note 21, at 280 (“Neither the marketplace nor the common law created a reliable mechanism for correcting inaccurate credit reports.”).

38. 15 U.S.C. § 1681–1681(x).

39. *Id.* § 1681(a)(4).

40. *Id.* § 1681(a)(2)–(3) (“An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers. Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.”).

41. *Id.* § 1681m; see also 134 CONG. REC. 21,394–95 (1988).

42. 15 U.S.C. § 1681j. If consumers have not yet been denied credit based on a credit report, credit bureaus are authorized to charge a small fee for access to a credit file. *Id.* § 1681j(f).

43. *Id.* § 1681i(a)(1)(A). Once the information is verified as accurate, there is no way to remove it from an individual’s credit report. See Leonard Sloane, *Need Credit? Be Wary of Clinics Offering Help*, N.Y. TIMES, July 23, 1988, at 52.

44. See EPSTEIN, *supra* note 27, at 66.

45. See 15 U.S.C. § 1681(a).

46. See 134 CONG. REC. 21,395 (1988); see also *infra* Part I.B.1.



### 3. Equal Credit Opportunity Act

In yet another affirmation of the importance of credit in American society, Congress enacted the Equal Credit Opportunity Act (ECOA) in 1974.<sup>47</sup> The ECOA prohibits lenders from discriminating against applicants on any basis other than creditworthiness.<sup>48</sup> Originally written to prohibit discrimination in lending based on sex or marital status,<sup>49</sup> amendments made in 1975 rendered it a violation of the ECOA to discriminate on the basis of, among other things, race, age, color, religion, and national origin.<sup>50</sup> The ECOA makes the inability to repay a loan the only legal basis for the denial of credit.<sup>51</sup>

#### B. Increased Protection Leads to Increased Predation

##### 1. The Development of Credit Repair Organizations

Despite these efforts to resolve the problems facing consumers in credit transactions, the statutory protections of TILA, the FCRA, and the ECOA did not have a wholly protective effect.<sup>52</sup> The provisions of the FCRA that allow consumers to dispute unfavorable credit reports led to the creation of organizations seeking to profit from these new rights.<sup>53</sup> These credit repair agencies advertise themselves as being a quick fix for those thwarted by bad credit.<sup>54</sup> They attempt to provide this rapid credit improvement by taking advantage of a provision within the FCRA which states that disputed information that cannot be verified within thirty days must be deleted from

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47. 15 U.S.C. §§ 1691–1691f (2006). A study showing that lenders discriminated against women in granting credit precipitated the passage of this act. Pub. L. No. 93-495, § 502, 88 Stat. 1500, 1521 (codified as amended at 15 U.S.C. § 1691); see EPSTEIN, *supra* note 27, at 72.

48. See EPSTEIN, *supra* note 27, at 72; see also BURDA, *supra* note 28, at 5–7.

49. See Pub. L. No. 93-495, § 502, 88 Stat. at 1521 (finding that the economy would be improved by “an absence of discrimination on the basis of sex or marital status”).

50. See S. Rep. No. 94-589 (1976), reprinted in 1976 U.S.C.C.A.N. 403, 405 (“[T]his bill identifies characteristics of applicants which the Committee believes are, and must be, irrelevant to a credit judgment, and prohibits or curtails their use.”).

51. See BURDA, *supra* note 28, at 5.

52. See James P. Nehf, *A Legislative Framework for Reducing Fraud in the Credit Repair Industry*, 70 N.C. L. REV. 781, 783–87 (1992) (discussing problems arising from the operation of the Fair Credit Reporting Act (FCRA)); *Credit Repair? Buyer Beware!*, FED. TRADE COMM’N (Mar. 5, 1998), <http://www.ftc.gov/opa/1998/03/eraser.shtm> [hereinafter *Buyer Beware*] (discussing the Federal Trade Commission’s (FTC) “Operation Eraser,” aimed at cracking down on the predatory practices of credit repair organizations).

53. See 134 CONG. REC. 21,394–95 (1988); see also Eugene J. Kelley, Jr. et al., *The Credit Repair Organization Act: The “Next Big Thing?”*, 57 CONSUMER FIN. L. Q. REP. 49, 49 (2003) (“Consumer concern over the negative impact of adverse credit ratings has given birth to a new industry . . . [that] offer[s] seemingly quick and easy ways for subprime consumers to ‘repair’ their credit.”).

54. One organization advertises on its website that “[o]ur typical customer sees an increase of 40–50 points in his or her credit score in just over a month.” CREDITREPAIRCLINIC.COM, <http://www.creditrepairclinic.com> (last visited Apr. 20, 2011).

the consumer's file.<sup>55</sup> Because of the damaging effect of a negative credit report on an individual,<sup>56</sup> consumers reacted positively to the ability to "establish . . . positive credit."<sup>57</sup> The success of these enterprises flows from the quantity of business obtained: the companies "inundat[e] consumer reporting agencies with so many challenges to consumer reports that the reinvestigation system breaks down, and the adverse, but accurate, information is deleted."<sup>58</sup> This approach does not have a high success rate, so credit repair clinics often obtain fees from consumers without having any impact on the client's credit report.<sup>59</sup> Thus, credit repair organizations profit whether successful or not and do so by collecting fees charged to those already in weak financial straits.<sup>60</sup>

## 2. Passage of the Credit Repair Organizations Act

To combat this problem, Congress passed the Credit Repair Organizations Act as Title IV of the Omnibus Consumer Credit Protection Act in 1996, which took effect on April 1, 1997.<sup>61</sup> The CROA's legislative history reveals that its main goal is information dissemination.<sup>62</sup> Supporters of the bill frequently expounded on the harm posed to consumers by credit repair clinics,<sup>63</sup> as well as the extreme importance of

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55. See 15 U.S.C. § 1681i(a)(1)(A) (2006). Section 1681i(a)(5)(A) requires credit reporting agencies to delete the information that cannot be verified after a reasonable reinvestigation and then to notify the consumer of the modification in her credit report. See also *supra* Part I.A.2.

56. See Kelley et al., *supra* note 53, at 49 ("'Bad credit,' which may result from a variety of sources, including unemployment, divorce, illness, a lack of financial discipline, or simply 'too many' bills, often seems an insurmountable roadblock for individuals seeking to do anything from purchasing a car to refinancing their home.").

57. DSISOLUTIONS, <http://www.repairyourbadcredit.com/ourservice.htm> (last visited Apr. 20, 2011).

58. H.R. REP. NO. 103-486, at 57 (1994).

59. In one notable case, 9000 people lost \$2 million to one credit repair clinic in New Jersey. The clinic charged customers up to \$2000 in exchange for a promise to remove unfavorable credit information from the individual's files. After obtaining payment from customers, the company did nothing to clear the clients' credit histories or extend their available credit. See Sloane, *supra* note 43; see also John L. Ropiequet & Jason B. Hirsh, *The Credit Repair Organizations Act: Recent Developments*, 64 CONSUMER FIN. L. Q. REP. 13, 13 (2010) ("[W]hile some credit repair organizations genuinely seek to help cure poor credit scores, others may victimize consumers by making fantastic and baseless promises that any type of bad credit can be legally repaired, for a price.").

60. See 136 CONG. REC. 18,766 (1990) ("[Credit repair organizations] prey on consumers whose dreams of a better life and desperate situation make them susceptible to the false promises of unscrupulous credit repair operators."); Kelley et al., *supra* note 53, at 49 (referring to those who utilize credit repair organizations as "unsophisticated and financially vulnerable"); Sloane, *supra* note 43 (describing credit repair clinics as "profit-making ventures that, by their very nature, often operate at the edge of the law, thwarting the maintenance of orderly credit records [o]n behalf of clients who have bad credit histories").

61. 15 U.S.C. § 1679 (2006).

62. See H.R. REP. NO. 103-486, at 57 (1994) ("This title seeks . . . to ensure that consumers are provided with necessary information about credit repair organizations so that they can make informed decisions regarding the purchase of their services . . .").

63. See 136 CONG. REC. 18,766 (1990) ("[T]he only thing that most credit repair clinics clean out are consumers' checkbooks.").

an individual's credit history in today's society.<sup>64</sup> The legislative history of the CROA manifests a desire to stop the frequent offers by credit repair organizations to "fix" unfixable credit histories and to make consumers more aware of the limitations of credit repair organizations.<sup>65</sup>

The legislative history of the CROA suggests that credit repair organizations bring little value to the credit reporting industry and also conveys a strong impression that those enacting the CROA believed that credit repair organizations pose a greater threat than they are worth.<sup>66</sup> Indeed, even the former owner of a credit repair clinic has acknowledged the misconduct of his previous business.<sup>67</sup>

### C. *Shelter from Harmful Repair: The CROA*

This section provides an examination of the CROA and the different forms of consumer protection that the statute offers. The CROA begins by discussing the type of entity that is considered a credit repair organization.<sup>68</sup> It then delineates the disclosures it requires, outlines the requirements it imposes on contract formation, and explains the consumer's right to cancel a contract.<sup>69</sup> Finally the CROA describes the effect of contracts or agreements not in compliance with the CROA, civil liability for violations of the Act, administrative enforcement of the CROA, the statute of limitations, and the CROA's relation to state law.<sup>70</sup> The FTC, state attorneys general, or private citizens who have been misled by a credit repair organization may enforce the CROA.<sup>71</sup>

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64. *See id.* ("Credit is the lifeblood of the American consumer society. . . . A poor credit history is the 'Scarlet Letter' of 20th century America.").

65. *See* 140 CONG. REC. 8,999 (1994) (statement of Sen. Reagle) ("[T]he representations of these so-called credit doctors prove misleading, deceiving consumers into paying higher fees or causing credit bureaus to waste time and money on spurious disputes."); 136 CONG. REC. 18,766 (1990) ("Credit repair organizations hold out the promise of a quick credit fix at a high cash price."); *id.* at 3,821 (referring to the legislation as "critically needed" to help protect consumers from credit repair organizations.).

66. *See Buyer Beware*, *supra* note 52 ("The FTC has never seen a legitimate credit repair company.").

67. *See Credit Repair Organizations Act: Hearing Before the Subcomm. on Consumer Affairs and Coinage of the Comm. on Banking, Fin., and Urban Affairs*, 100th Cong. 18 (1988) [hereinafter *Hearing*] (statement of Jeffrey Roberts) ("In my opinion, there is no such thing as credit repair, so instead of being regulated, the industry should be outlawed. If not, the regulation should be so tough and the bond so high that people are discouraged from going into the business."); *see also* Sloane, *supra* note 43 ("Credit-repair clinics . . . operate at the edge of the law . . .").

68. *See* 15 U.S.C. § 1679a(3).

69. *See id.* §§ 1679b–e.

70. *See id.* §§ 1679f–j.

71. *See id.* § 1679h; Kelley et al., *supra* note 53, at 52.

### 1. What a Credit Repair Organization Is

The exact definition of a credit repair organization is vague.<sup>72</sup> As defined by the CROA, a credit repair organization is an organization dealing in interstate commerce that accepts money in exchange for “improving any consumer’s credit record, credit history, or credit rating; or . . . providing advice or assistance to any consumer with regard to any activity or service described” elsewhere in the statute.<sup>73</sup> The CROA specifically exempts certain entities.<sup>74</sup>

Courts have grappled with the issue of whether certain types of professionals, including attorneys and banks, fall within the ambit of the CROA when these entities provide credit counseling services.<sup>75</sup> The U.S. District Court for the Central District of California found that an attorney fell within the definition of a credit repair organization when he issued advertisements saying “BAD CREDIT REPORT . . . Improve Your Credit Score Now!”<sup>76</sup> Although the attorney argued that in dealings with the client, he acted as a lawyer and not as a credit repair organization, the court held that because he performed services with the intention of improving the client’s credit rating, the CROA encompassed his actions.<sup>77</sup>

### 2. What a Credit Repair Organization Does

A business that meets the statutory definition of a credit repair organization comes within the ambit of the CROA only if it engages in certain conduct specified in the CROA.<sup>78</sup> Actions that constitute offering a service under the CROA must relate to improving a consumer’s “credit record, credit history, or credit rating.”<sup>79</sup> The parameters of this provision are rather broad.<sup>80</sup> Courts assessing whether or not an entity provided services as intended under the CROA look to representations that the entity has made to its clients.<sup>81</sup> For example, the U.S. District Court for the Northern District of Georgia held that an online credit guide, which

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72. In clarifying the definition of a credit repair organization, one court has analogized these clinics to “a person who offers to improve a golfer’s score after a round is over by . . . making changes to the golfer’s scorecard . . . . By contrast, a person who offers to give a golfer swing tips to improve his score . . . is not a CRO.” See *Hillis v. Equifax Consumer Servs., Inc.*, 237 F.R.D. 491, 514 (N.D. Ga. 2006).

73. See 15 U.S.C. § 1679a(3)(A).

74. See *id.* § 1679a(3)(B)(i)–(iii) (exempting, for example, nonprofit organizations, depository institutions, and government credit unions).

75. See, e.g., *Rannis v. Fair Credit Lawyers, Inc.*, 489 F. Supp. 2d 1110, 1114 (C.D. Cal. 2007).

76. See *id.* at 1114–15.

77. *Id.* at 1115.

78. See 15 U.S.C. § 1679a(3)(A)(i)–(ii).

79. *Id.* § 1679a(3)(A)(i).

80. See, e.g., *Hillis v. Equifax Consumer Servs., Inc.*, 237 F.R.D. 491, 511 (N.D. Ga. 2006) (finding the CROA’s definition of a credit repair organization “sweeping”).

81. See Lori J. Parker, Annotation, *Proof of Claim Involving Violation of Credit Repair Organizations Act, 15 U.S.C.A. §§ 1679 et seq., or Similar State Enactment*, 111 AM. JUR. 3D *Proof of Facts* § 4 (2010).

defendants sought to define as a product, constituted a service subject to the CROA.<sup>82</sup> Similarly, the U.S. District Court for the District of New Jersey determined that a company offering an analysis of credit reports designed to improve customers' credit offered a service that fell within the CROA.<sup>83</sup>

### 3. Substantive Violations of the CROA

The CROA sets forth four substantive actions that render an entity liable for violations of the CROA.<sup>84</sup> Section 1679b(a)(1) prohibits the making of untrue or misleading statements about a consumer's credit standing or credit capacity to a consumer reporting agency or to anyone who has extended credit to the consumer or from whom the consumer seeks an extension of credit.<sup>85</sup> Misleading statements to an organization not providing credit to the client-consumer, however, do not fall under the CROA.<sup>86</sup>

Next, section 1679b(a)(2) makes it illegal to alter information about a consumer's identity and to conceal adverse information about a consumer's creditworthiness.<sup>87</sup> This section includes counseling or advising a consumer to make a statement intended to prevent accurate reporting of the consumer's credit record as an aspect of the prohibition.<sup>88</sup> Section 1679b(a)(3) prohibits making misleading representations of the services of which a credit repair organization is capable.<sup>89</sup> Similarly, any practice that constitutes fraud on any person involved in the offer or sale of the services of a credit repair organization violates the CROA pursuant to section 1679b(a)(4).<sup>90</sup>

### 4. Technical Violations of the CROA

Failure to follow the technical requirements of the CROA constitutes a violation of the Act, regardless of whether the credit repair organization engaged in fraudulent behavior or committed any substantive violation of the CROA.<sup>91</sup> These technical conditions require that agreements with consumers be in the form of a written contract.<sup>92</sup> The contract must include

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82. See *Hillis*, 237 F.R.D. at 509–10.

83. See *In re Nat'l Credit Mgmt. Grp., LLC*, 21 F. Supp. 2d 424, 457 (D.N.J. 1998) (“Although the Defendants do not provide services to repair credit histories, they do represent that they will perform services, monitor, and provide advice to assist consumers [with] improv[ing] their credit ratings.”).

84. See 15 U.S.C. § 1679b.

85. *Id.* § 1679b(a)(1).

86. See *Whitley v. Taylor Bean & Whitacker Mortg. Corp.*, 607 F. Supp. 2d 885, 899 (N.D. Ill. 2009).

87. 15 U.S.C. § 1679b(a)(2).

88. *Id.*

89. *Id.* § 1679b(a)(3).

90. *Id.* § 1679b(a)(4).

91. See *id.* §§ 1679c–d.

92. See *id.* § 1679d(a).

the terms of payment and the services to be provided.<sup>93</sup> Additionally, the CROA requires that a specific written disclosure be made to consumers prior to the formation of an agreement.<sup>94</sup> Credit repair organizations must provide this disclosure as a document separate from the contract,<sup>95</sup> and the organization must retain the consumer's signed acknowledgement of receipt of the disclosure.<sup>96</sup> The CROA explicitly provides that these requirements cannot be waived.<sup>97</sup>

#### *D. Local Protection: Similar State Enactments*

Several states have enacted legislation to serve the same purposes as the CROA under the auspices of state law.<sup>98</sup> These statutes represent some of the more unique and noteworthy approaches to protecting consumers from credit repair organizations. An examination of these statutes reveals an effort to provide consumers with information and to penalize credit repair organizations for misconduct.

Several states have deemed violations of the state law regulating credit repair organizations a criminal offense.<sup>99</sup> These statutes provide that violations of the statute constitute a misdemeanor, and some classify repeat offenses as a felony.<sup>100</sup> Notably, Georgia's relevant statute makes any operation of a credit repair organization whatsoever a misdemeanor.<sup>101</sup> Several states make an organization's failure to post bond a violation of the statute.<sup>102</sup> Another common provision in state statutes requires credit repair organizations to register with the state before conducting business.<sup>103</sup>

Many state statutes provide for injunctive relief against a credit repair clinic.<sup>104</sup> Some states place the burden of proof on the defendant to prove

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93. *See id.* § 1679d(b).

94. *See id.* § 1679c(a). The aspect of the disclosure requirements most pertinent to this Note is the portion stating that "[y]ou have the right to sue a credit repair organization that violates" the CROA. *Id.* The only time a "right to sue" is mentioned in the statute is in this required disclosures section. *Id.*

95. *See id.* § 1679c(b).

96. *Id.* § 1679c(c).

97. *Id.* § 1679f.

98. *See Parker, supra* note 81, at 237.

99. *See, e.g.,* ARK. CODE ANN. § 4-91-104 (2001); COLO. REV. STAT. ANN. § 12-14.5-110 (West 2010); 815 ILL. COMP. STAT. 605/13 (1993); IOWA CODE ANN. § 538A.12 (West 1997); KAN. STAT. ANN. § 50-1113 (West 1994).

100. *See, e.g.,* 815 ILL. COMP. STAT. 605/13 ("Upon conviction of a second or subsequent offense the violator is guilty of a . . . felony.").

101. *See* GA. CODE ANN. § 16-9-59 (2007). The statute provides that any organization that seeks to improve a buyer's credit history, to obtain an extension of credit, or to provide advice on the aforementioned subjects is guilty of a misdemeanor. *Id.* § 16-9-59(c). The statute exempts several professionals from the statute, however, including real estate brokers, attorneys, and consumer reporting agencies. *Id.* § 16-9-59(a)(2)(B)(iv)–(vii).

102. *See, e.g.,* ARIZ. REV. STAT. ANN. § 44-1703 (2003); IOWA CODE ANN. § 538A.4; KAN. STAT. ANN. § 50-1104.

103. *See, e.g.,* CAL. CIV. CODE § 1789.25 (West 2009); DEL. CODE ANN. tit. 5, § 2404 (2010).

104. *See, e.g.,* IOWA CODE ANN. § 538A.10; KAN. STAT. ANN. § 50-1110.

exemption from the statute,<sup>105</sup> and some explicitly restrict the amount of fees an organization qualifying under the statute can charge.<sup>106</sup> Oklahoma's statute entitles the Administrator of Consumer Credit to free access to inspect a credit repair organization's books and records.<sup>107</sup> Puerto Rico's statute requires any individual operating a credit repair service to have certain credentials,<sup>108</sup> and bars credit repair services from transferring funds without prior authorization from the Commissioner of Financial Institutions.<sup>109</sup> Several of these statutes contain disclosure requirements mirroring that of the CROA, including the required disclosure that individuals have "a right to sue."<sup>110</sup> These statutes reflect an awareness by state legislators that the danger inherent in the operation of credit repair organizations requires stringent rules to prevent wrongdoing.

## II. THE PRACTICE OF ARBITRATION, THE FEDERAL ARBITRATION ACT, AND HOW THE SUPREME COURT HAS SHAPED ARBITRATION

This part first discusses the origins and various forms of alternative dispute resolution. It then examines the practice of arbitration and analyzes the significant body of case law regarding arbitration that has developed since the passage of the FAA.

### A. *Beyond the Courthouse: The Origins and Objectives of Alternative Dispute Resolution*

Alternative dispute resolution (ADR) is a term that encompasses several methods of conflict resolution,<sup>111</sup> many of which have been used for centuries.<sup>112</sup> Evidence of the usage of negotiation, mediation, and arbitration in ancient times abounds.<sup>113</sup> In addition to these roots, interest in ADR has burgeoned in recent years.<sup>114</sup> Since the 1960s, usage,

105. See, e.g., CAL. CIV. CODE § 1789.19.

106. See, e.g., KAN. STAT. ANN. § 50-1105.

107. See OKLA. STAT. ANN. tit. 24, § 146 (West 1998).

108. See P.R. LAWS ANN. tit. 7, § 630e (2006) ("Any [credit repair agent] shall have a bachelor's degree and two . . . years of experience in the area of credit granting and analysis with a financial institution or five . . . years of experience in said market if he/she lacks the bachelor's degree.").

109. See *id.* § 630n.

110. See, e.g., CAL. CIV. CODE § 1789.15.

111. See OSCAR G. CHASE, LAW, CULTURE, AND RITUAL: DISPUTING SYSTEMS IN CROSS-CULTURAL CONTEXT 95 (2005) ("In the United States [Alternative Dispute Resolution (ADR)] has included a potpourri of processes . . . . Although alike in that they do not contemplate a judicial determination of a dispute, these are very different processes . . .").

112. See JEROME T. BARRETT WITH JOSEPH P. BARRETT, A HISTORY OF ALTERNATIVE DISPUTE RESOLUTION XXV, 1–18 (2004) (identifying 1800 B.C. as the first instance of the practice of mediation and arbitration).

113. See, e.g., *id.* at 2–18 (describing the usage of ADR in ancient societies, including Confucius's use of mediation in China in 500 B.C. and Ancient Greek arbitration in 400 B.C.).

114. See IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION—NATIONALIZATION—INTERNATIONALIZATION 3 (1992) ("ADR . . . has for a number of years been one of the hottest of all hot topics in the legal academy. As with each new generation

discussion, and criticism of ADR within the U.S. legal system have intensified.<sup>115</sup>

The central premise of ADR emerges from the limitations inherent in the litigation process.<sup>116</sup> The common thread among all ADR methods is an effort to avoid the delay, expense, and rigidity of litigation.<sup>117</sup> These methods fall along a spectrum of varying formality and compulsion.<sup>118</sup> Negotiation combines elements of informality and privacy that are not available in a traditional trial,<sup>119</sup> mediation involves a third-party neutral moderator but entrusts a final decision to the parties themselves,<sup>120</sup> and arbitration involves the use of a private third party neutral who renders an award that is typically binding.<sup>121</sup> Falling in between these three methods on the ADR spectrum are hybrid methods including, for example, the mini-trial,<sup>122</sup> Med-Arb,<sup>123</sup> bracketed arbitration,<sup>124</sup> and facilitative mediation.<sup>125</sup>

The widespread use of these methods has strongly impacted traditional litigation over the past forty years.<sup>126</sup> ADR methods are now used in

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and sex, so too this academic generation and ADR: it thinks it discovered the whole thing. Like sex, however, ADR is as old as humanity itself, and the academic ADR movement is largely one of rediscovery by the academy.”).

115. See JAY FOLBERG ET AL., *RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW* 5 (2005) (discussing societal forces that led to the increased use of ADR, including new legislation, increased prosecution of drug crimes, and numerous domestic relations case filings).

116. See *id.* at 2–7, 19.

117. See *id.* at 5.

118. See *id.* at 3.

119. See *id.* at 19 (describing negotiation as a “process of communication used to get something we want when another person has control over whether or how we can get it”).

120. See *id.* at 223 (“Mediation . . . involves the participation of an impartial third party. . . . [I]t is consensual, informal, and usually private: The participants need not reach agreement, and the mediator has no power to impose an outcome.”).

121. See *id.* at 453.

122. See STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 230 (2d ed. 1992). A mini-trial is a process in which neutral advisors and executives hear presentations by each party and negotiate a resolution. *Id.*

123. In Med-Arb, a third party serves as a mediator initially, switching gears into the role of an arbitrator issuing a binding decision should mediation fail during the process. See *id.* at 226; see also FOLBERG ET AL., *supra* note 115, at 647 (describing Arb-Med, a process by which a neutral third party acts as an arbitrator until she has decided upon an award, at which point the award is sealed and she can engage in mediation between the parties, with the sealed award serving as a last resort should mediation fail).

124. See FOLBERG ET AL., *supra* note 115, at 496. Bracketed arbitration is a process in which the parties identify a range of recovery prior to arbitration, and the arbitrator’s decision is binding only in the event that it falls within this range. *Id.*

125. See *id.* at 4, Fig. 1.1; see also *ADR Glossary*, JAMS: THE RESOLUTION EXPERTS, <http://www.jamsadr.com/adr-glossary> (last visited Apr. 20, 2011) (describing facilitative mediation as a process whereby the parties largely control the outcome and the mediator simply enhances communication and information exchange between the parties).

126. See *Courtroom Use: Access to Justice, Effective Judicial Administration, and Courtroom Security: Hearing Before the H. Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. 72 (2010) [hereinafter *Resnik Testimony*] (statement of Judith Resnik, Professor, Yale Law School) (noting that the 20th century began with 30,000 federal cases pending, ended with 300,000 cases pending, and although the



business, family, “toxic tort, farmer-lender, and doctor-patient” disputes, to name a few.<sup>127</sup> In 1998, Congress passed the Alternative Dispute Resolution Act, requiring federal district courts to utilize some form of ADR program in all civil actions.<sup>128</sup> While the number of cases filed in court has increased, the number of cases tried has drastically decreased, leading some scholars to deliberate over the benefits and disadvantages of “the vanishing trial” on our legal system.<sup>129</sup>

*B. “The Most Venerable ADR Mechanism”: Arbitration in Practice*

Arbitration sits closest to a formal trial on the spectrum of dispute resolution processes.<sup>130</sup> Broadly, arbitration is “any process in which a private third party neutral renders a judgment, or ‘award,’ regarding a dispute after hearing evidence and argument, like a judge.”<sup>131</sup> A wide array of practices can be characterized as arbitration.<sup>132</sup> This Note is primarily concerned with pre-dispute mandatory arbitration,<sup>133</sup> in which parties agree

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Long Range Plan of the Federal Courts anticipated that by 2010 this number would exceed 600,000, the number has stayed near 350,000).

127. See GOLDBERG ET AL., *supra* note 122, at 10; see also Jean R. Sternlight, *Consumer Arbitration*, in ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT 127, 129 (Edward Brunet et al. eds., 2006) (“Arbitration has even been mandated in connection with games sponsored by the McDonald’s hamburger chain and with respect to a mail-in on a Cheerios cereal box.”).

128. 28 U.S.C. §§ 651–658 (2006). This statute joins several ADR statutes passed by Congress in the last thirty years requiring various branches of government to institute ADR programs. See Administrative Dispute Resolution Act of 1990, 5 U.S.C. §§ 571–584 (2006) (requiring administrative agencies to utilize ADR); Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471–482 (requiring district courts to devise programs that will lead to reduced costs and delay within four years); Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988) (codified as amended in scattered sections of 28 U.S.C.) (authorizing certain federal district courts to employ arbitration referral programs); Dispute Resolution Act of 1980, Pub. L. No. 96-190, 94 Stat. 17 (encouraging the creation of ADR mechanisms in state and local governments).

129. See James E. McGuire, *Some Questions About “The Vanishing Trial”*, DISP. RESOL. MAG., Winter 2004, at 17 (“[O]nly where important interests or needs are not being met should we look for solutions to the ‘vanishing trial.’”). But see Resnik Testimony, *supra* note 126, at 84 (“[P]ublic adjudicatory procedures make important contributions to functioning democracies.”); Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Reshaping our Legal System*, 108 PENN. ST. L. REV. 165, 196–97 (2003) (“[T]he visible presence of institutionalized and legitimized conflict, channeled productively, teaches citizens that it is not always better to compromise and accept the status quo because, sometimes, great gains are to be had by peaceful contest.”).

130. See FOLBERG ET AL., *supra* note 115, at 4.

131. *Id.* at 453; see also BLACK’S LAW DICTIONARY 119 (9th ed. 2009) (defining arbitration as “[a] method of dispute resolution involving one or more neutral third parties who are usu[ally] agreed to by the disputing parties and whose decision is binding”).

132. Indeed, one scholar has even suggested that Virgil’s *Aeneid* is a tale of “arbitration gone awry.” BARRETT, *supra* note 112, at 6–7.

133. Even the moniker given to this form of arbitration is debated. See Stephen J. Ware, *Contractual Arbitration, Mandatory Arbitration, and State Constitutional Jury-Trial Rights*, 38 U.S.F. L. REV. 39, 41 (2003) (“What [some call] mandatory arbitration is better called contractual arbitration because . . . [a]rbitration is not mandatory when it arises out of a contract, because contracts are formed voluntarily. . . . In the absence of duress, it is

to arbitrate prior to entering into, or as part of, an agreement.<sup>134</sup> Traditionally, the hallmarks of arbitration are its binding nature and its adversarial quality.<sup>135</sup> Parties choose arbitration over other forms of dispute resolution because arbitration affords a speedy, less expensive, and more confidential resolution of disputes.<sup>136</sup> Additionally, because arbitration is held in private and arbitrators need not issue written decisions, no precedent results from arbitration proceedings.<sup>137</sup>

Arbitration may come about either as a result of a prior agreement to arbitrate or as a court-ordered process.<sup>138</sup> Some courts<sup>139</sup> now require arbitration of certain kinds of disputes before those claims proceed to litigation.<sup>140</sup> Most arbitrations occur under the auspices of one of several arbitration associations.<sup>141</sup> These organizations promulgate procedures, rules, and limitations that govern arbitration proceedings.<sup>142</sup> Many pre-dispute arbitration agreements include a reference to which association will govern the dispute.<sup>143</sup> When parties have signed a pre-dispute arbitration agreement, upon the development of a dispute, one party may initiate proceedings, the parties will select an arbitrator, and the process will proceed.<sup>144</sup>

When a party has filed suit despite the existence of an arbitration agreement, a court usually takes four steps in determining whether to order

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inaccurate, as well as overly dramatic, to say that a contract containing an arbitration clause results in arbitration that is involuntary or mandatory.”).

134. See LAURIE S. COLTRI, CONFLICT DIAGNOSIS AND ALTERNATIVE DISPUTE RESOLUTION 431, tbl. 19-1 (2004) (describing the different forms of arbitration by means of a diagram).

135. See FOLBERG ET AL., *supra* note 115, at 453.

136. See *id.*; see also CHASE, *supra* note 111, at 95 (“Arbitration has often been embraced by business interests for its supposed cost savings over adjudication, because the results can be shielded from public exposure, and because of its reliance on decision makers knowledgeable about the type of dispute to be resolved.”).

137. See CHASE, *supra* note 111, at 95; see also Alderman, *supra* note 17, at 155 (“[M]ost decisions of arbitrators are secret, and are often not even accompanied by a written opinion. Even when published and made available to the public, the decision of one arbitrator . . . is in no way binding on any other arbitrator or panel.”).

138. See FOLBERG ET AL., *supra* note 115, at 464.

139. See *supra* note 128 and accompanying text.

140. See FOLBERG ET AL., *supra* note 115, at 464 (mentioning medical malpractice claims and suits involving less than \$50,000 in damages as examples of suits that courts require to be arbitrated prior to the commencement of formal litigation proceedings); see also Wayne D. Brazil, *Why Should Courts Offer Non-Binding ADR Services?*, 16 ALTERNATIVES 65, 75 (1998) (pointing to the importance of relationship building, as well as the provision of mechanisms for less affluent plaintiffs to vindicate claims, as reasons for court-annexed ADR services).

141. See FOLBERG ET AL., *supra* note 115, at 466.

142. See *id.* (“[T]here are literally dozens of different arbitration rules for different trade groups or practice areas . . .”); *Consumer-Related Disputes Supplementary Procedures*, AMERICAN ARBITRATION ASSOCIATION, <http://www.adr.org/sp.asp?id=22014> (last visited Apr. 20, 2011); *JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses: Minimum Standards of Procedural Fairness*, JAMS: THE RESOLUTION EXPERTS, <http://www.jamsadr.com/consumer-arbitration/> (last visited Apr. 20, 2011).

143. See FOLBERG ET AL., *supra* note 115, at 466.

144. See *id.* at 467.

arbitration.<sup>145</sup> The court first decides if the parties formed an agreement to arbitrate.<sup>146</sup> If an agreement exists, the court then examines the scope of that agreement.<sup>147</sup> Next, the court determines, in the case of federal statutory claims, if Congress intended these claims to be resolved solely in litigation.<sup>148</sup> Finally, the court decides whether to stay the remainder of the proceedings pending arbitration if it decides that not all the claims are arbitrable.<sup>149</sup>

Under the FAA, an arbitration award may be vacated only in a narrow set of circumstances.<sup>150</sup> Arbitrators have extensive discretion, do not need to explain decisions, and do not make findings of fact.<sup>151</sup> Vacatur of an arbitrator's award is granted only if one of four statutory grounds are met: the award reflects fraud; clear bias on the part of the arbitrator; procedural misconduct on the part of the arbitrator; or that the arbitrators have "exceeded their powers, or . . . imperfectly executed them."<sup>152</sup>

### *C. The Evolution of Arbitration Jurisprudence*

#### *1. Early Arbitration Agreements in the Courts*

Arbitration as a method of conflict resolution has a long and fraught history. Some of the first known arbitrators and users of arbitration include King Solomon,<sup>153</sup> Philip II of Macedonia,<sup>154</sup> and George Washington.<sup>155</sup> Despite these esteemed origins, arbitration has not always been treated as the "valid, irrevocable, and enforceable"<sup>156</sup> proceeding that most courts consider it today. English courts did not hesitate to invalidate arbitration

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145. Several circuits adhere to this four-part test. *See, e.g.,* Guyden v. Aetna, Inc., 544 F.3d 376, 382 (2d Cir. 2008); Glazer v. Lehman Bros., Inc., 394 F.3d 444, 451 (6th Cir. 2005). The test is taken from language within *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

146. *See Glazer*, 394 F.3d at 451.

147. *See id.*

148. *See id.*

149. *See id.*

150. *See* 9 U.S.C. §§ 1–16 (2006); *see also infra* Part II.C.5.

151. *See* THOMAS E. CARBONNEAU, *THE LAW AND PRACTICE OF ARBITRATION* 48–51 (3d ed. 2009).

152. 9 U.S.C. § 10.

153. *See* RICHARD A. BALES, *COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT* 5 n.30 (1997) (citing a verse of the King James Bible in which Solomon uses arbitration to resolve a conflict over the motherhood of a baby).

154. *See id.* at 5 ("Philip II of Macedonia, the father of Alexander the Great, specified the use of arbitration in disputes arising under his peace treaty with the city-states of southern Greece.").

155. *See id.* ("George Washington provided that any disputes concerning his intentions in his will would be resolved by a panel of three arbitrators, and that the decision of those arbitrations would be 'as binding on the Parties as if it had been given in the Supreme Court of the United States.'"); *see also* BARRETT, *supra* note 112, at 46 (excerpting Washington's will).

156. 9 U.S.C. § 2; *see also* BALES, *supra* note 153, at 4 ("[F]inality distinguishes arbitration from mediation . . . . Arbitration ends the dispute.").

agreements into which parties had entered.<sup>157</sup> Moreover, courts often rescinded the authority given to arbitrators and at most granted only nominal damages for breach of an agreement to arbitrate.<sup>158</sup> Commentators and courts have explained this entrenched hostility toward arbitration as stemming from a belief that arbitration was ineffective when unsupervised.<sup>159</sup> There is some evidence, however, that English courts were concerned about losing money and business if arbitration became too popular and caused courts to be used less frequently.<sup>160</sup> An English statute passed by Parliament in 1889 led to increased enforcement of arbitration awards in English courts.<sup>161</sup> American courts, however, continued to treat arbitration agreements as suspect.<sup>162</sup> A brief period of time followed during which courts invalidated arbitration agreements but did so reluctantly.<sup>163</sup>

## 2. Arbitration Is Federalized: The Passage of the Federal Arbitration Act

In 1925, Congress passed the United States Arbitration Act “[t]o make valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations.”<sup>164</sup> While the passage of this Act was generally lauded in the legal community,<sup>165</sup> some were hesitant about the benefits of using arbitration in a broader array of

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157. *See* *Kill v. Hollister*, (1746) 95 Eng. Rep. 532 (K.B.) (stating that “the agreement of the parties cannot oust this Court”).

158. *See* Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 604–05 (1928).

159. *See, e.g.*, *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 983 (2d Cir. 1942).

160. *See id.* at 983 n.14 (quoting Lord Campbell as saying “the emoluments of the Judges depended mainly, or almost entirely, upon fees, and as they had no fixed salaries, there was great competition to get as much as possible of litigation into Westminster Hall . . . for the division of the spoil”).

161. *See* Arbitration Act, 1889, 52 & 53 Vict., c. 49 (Eng.). The Act required courts to enforce arbitration. *See* BALES, *supra* note 153, at 16; *see also* *Austrian Lloyd S.S. Co. v. Gresham Life Assurance Soc’y, Ltd.*, [1903] 1 K.B. 249 (holding that an agreement to arbitrate was enforceable).

162. *See, e.g.*, *Ins. Co. v. Morse*, 87 U.S. (20 Wall.) 445, 458 (1874) (holding that a state statute enacted to enforce arbitration agreements “is repugnant to the Constitution of the United States . . . and is illegal and void”).

163. *See, e.g.*, *U.S. Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1012 (S.D.N.Y. 1915) (“[T]he Supreme Court has laid down the rule that such a complete ouster of jurisdiction . . . is void in a federal forum. . . . Inferior courts may fail to find convincing reasons for it; but the rule must be obeyed.”).

164. 43 Stat. 883 (1925).

165. *See* *Arbitration May Cure Law’s Delay and Result in More Exact Justice*, N.Y. TIMES, Apr. 8, 1923, at X15.

disputes.<sup>166</sup> Nevertheless, in 1947, this statute was reenacted and codified as the Federal Arbitration Act.<sup>167</sup>

The FAA makes enforceable written arbitration agreements,<sup>168</sup> specifically including maritime and interstate commerce transactions while expressly excluding “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”<sup>169</sup> The FAA sets out two methods by which agreements to arbitrate may be enforced. Section 3 provides that federal courts may issue stays of proceedings when an issue falls within the bounds of an arbitration agreement.<sup>170</sup> Section 4 provides that federal courts may issue orders compelling arbitration should a party to an arbitration agreement refuse to submit the issue to arbitration.<sup>171</sup>

A federal court may make these determinations only if a federal question is at issue or the parties meet the requirements of diversity jurisdiction.<sup>172</sup> Yet parties that do not meet the requirements of diversity jurisdiction<sup>173</sup> do not face a different body of arbitration law. The Supreme Court has repeatedly held that the FAA preempts any state law that may be inconsistent with the federal statute’s provisions or purposes.<sup>174</sup>

### 3. An Initial Rejection

Congress’s passage and reenactment of the FAA evidenced an increased approval of arbitration. Yet the Supreme Court’s first decision after the passage of the FAA concerning the enforceability of an arbitration clause reflected a step back from the expected liberal endorsement of arbitration. In *Wilko v. Swan*,<sup>175</sup> the Supreme Court considered a clash created by what it viewed as two conflicting policies: the FAA and the Securities Act of

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166. *See Arbitration is Not Always Best—Though Correct in Principle, It Has Numerous Pitfalls for Unwary Importers*, N.Y. TIMES, Aug. 3, 1924, at E10. The article argues that arbitration, while beneficial in some areas of conflict, is an inadequate method of conflict resolution for certain types of disputes. *See id.*

167. 9 U.S.C. §§ 1–16 (2006). One author has described arbitration as particularly well suited to American culture because it “involves a competitive process of dispute resolution, yet it allows disputants to resolve their differences outside the legal system.” *See* COLTRI, *supra* note 134, at 426.

168. *See* BALES, *supra* note 153, at 17 (“The FAA creates a body of federal substantive law permitting judicial enforcement of agreements to arbitrate in connection with commerce and maritime transactions.”).

169. 9 U.S.C. § 1.

170. *Id.* § 3.

171. *Id.* § 4.

172. *See* *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983) (“[The Arbitration Act] creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction.”).

173. *See* 28 U.S.C. § 1332 (2006).

174. *See* *Moses H. Cone*, 460 U.S. at 24 (“Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.”); *see also* *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (holding that the FAA preempts inconsistent state arbitration laws).

175. 346 U.S. 427 (1953).

1933.<sup>176</sup> After the plaintiff filed suit in the U.S. District Court for the Southern District of New York, the defendant moved to stay the proceedings pursuant to section 3 of the FAA and submit the claims to arbitration.<sup>177</sup> The district court denied the motion,<sup>178</sup> and a divided U.S. Court of Appeals for the Second Circuit reversed.<sup>179</sup>

The conflict arose from a provision of the Securities Act voiding any waiver of rights granted to consumers by the Act.<sup>180</sup> The plaintiff argued that an agreement to arbitrate a future controversy constituted a waiver of compliance with the Act, because of language in the Act declaring that “[t]he district courts of the United States . . . shall have jurisdiction of offenses and violations under this subchapter.”<sup>181</sup>

Additionally, the Act provided that for claims brought in federal court, “the purchaser has a wide choice of venue, the privilege of nation-wide service of process and the jurisdictional \$3,000 requirement of diversity cases is inapplicable.”<sup>182</sup> The plaintiff argued that these provisions of the Act indicated that Congress sought to ensure that the right of buyers to recover not be weakened, and that arbitration would not vindicate his rights as certainly as would a judicial forum.<sup>183</sup> The defendant argued that there was no conflict between the Securities Act and the FAA because “arbitration is merely a form of trial to be used in lieu of a trial at law.”<sup>184</sup>

The Supreme Court ultimately sided with the plaintiff.<sup>185</sup> The Court found that the Securities Act was primarily concerned with protecting buyers from certain disadvantages inherent in transactions, and that the rights bestowed upon the plaintiff by the Securities Act are less effectively vindicated in arbitration.<sup>186</sup> The unequal bargaining positions of the parties

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176. See 15 U.S.C. §§ 77a–aa (2006). It is a violation under the Securities Act of 1933 to sell a security by means of fraud. The plaintiff in this case alleged that the seller misrepresented the value of the stock being sold. See *Wilko*, 346 U.S. at 429.

177. *Wilko*, 346 U.S. at 429.

178. See *Wilko v. Swan*, 107 F. Supp. 75, 79 (S.D.N.Y. 1952) (finding that “arbitration of the issues at bar is [not] consistent with the policy and language as expressed by Congress in the Securities Act”).

179. See *Wilko v. Swan*, 201 F.2d 439, 445 (2d Cir. 1953) (“[W]e do not find in the purpose or in the language of the statute, any policy argument strong enough to override the policy of the Arbitration Act.”).

180. See 15 U.S.C. § 77n (“Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter . . . shall be void.”).

181. *Id.* § 77v.

182. *Wilko*, 346 U.S. at 431.

183. See *id.* at 432.

184. *Id.* at 433.

185. See *id.* at 434–35 (“This arrangement to arbitrate is a ‘stipulation,’ and we think the right to select the judicial forum is the kind of ‘provision’ that cannot be waived under section 14 of the Securities Act.”).

186. See *id.*

and the consequences of waiving a right to a judicial forum played significant roles in the Court's ultimate decision.<sup>187</sup>

The *Wilko* decision came to stand for the proposition that if a "pervasive public interest" was at stake, arbitration agreements should not be enforced.<sup>188</sup> After the Supreme Court decided *Wilko*, lower courts generally decided cases upon the premise that arbitration was an inadequate form of conflict resolution.<sup>189</sup> Despite the passage of the FAA, judicial hostility toward arbitration remained a governing theory, particularly in terms of the arbitration of statutory claims.<sup>190</sup>

#### 4. "A Healthy Regard" for Arbitration

Eventually the rationale of the FAA, that arbitration is an adequate forum for the vindication of statutory rights, prevailed in court. In 1985, the Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*<sup>191</sup> held that arbitration was an adequate method for resolution of claims arising under the Sherman Act.<sup>192</sup> Writing for the majority, Justice Harry A. Blackmun adhered to the common law contractual policy of giving force to the intentions of parties<sup>193</sup> and held that the existence of a statute upon which claims were predicated did not change this principle.<sup>194</sup> Blackmun did, however, caution against ignoring legitimate reasons for the invalidation of an arbitration agreement, and the Court did not formally overturn *Wilko*.<sup>195</sup> The proposition that emerged from *Mitsubishi*, as applied by lower courts, was that parties to an arbitration agreement would be required to arbitrate "unless Congress itself has evinced an intention to

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187. See *id.* at 435 ("When the security buyer, prior to any violation of the Securities Act, waives his right to sue in courts, he gives up more than would a participant in other business transactions.").

188. See *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 827–28 (2d Cir. 1968); see also *BALES*, *supra* note 153, at 19 (stating that the public policy defense created in *Wilko* presumed that "(1) a judicial forum was superior to arbitration for enforcing statutory rights; (2) compulsory arbitration constituted a waiver of the statutory right to a judicial forum, which contravened public policy; and (3) the informality of arbitration made it difficult for courts to correct errors in statutory interpretation").

189. See, e.g., *Laupheimer v. McDonnell & Co.*, 500 F.2d 21, 25–26 (2d Cir. 1974).

190. In addition to *Wilko*, the Supreme Court decided three cases in which it found that in enacting certain statutes, Congress did not intend the protections afforded by the statute to be administered by a private arbitrator. *McDonald v. City of W. Branch*, 466 U.S. 284, 290 (1984) (holding that claims under the Ku Klux Klan Act of 1871 should not be arbitrated); *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 745 (1981) (Fair Labor Standards Act); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 59–60 (1974) (Title VII of the Civil Rights Act of 1964).

191. 473 U.S. 614, 640 (1985).

192. See 15 U.S.C. §§ 1–7 (2006).

193. *Mitsubishi*, 473 U.S. at 625 (calling the FAA "at bottom a policy guaranteeing the enforcement of private contractual arrangements").

194. See *id.* at 626–27 ("[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.").

195. See *id.* at 627.

preclude a waiver of judicial remedies for the statutory rights at issue.”<sup>196</sup> The principle announced by the Court in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*<sup>197</sup> two years earlier, that “questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration,”<sup>198</sup> was, for the first time, expanded to reach claims based on federal statutes as well.<sup>199</sup>

After upholding an agreement to arbitrate claims arising under the Racketeer Influenced Corrupt Organizations Act (RICO) in 1987,<sup>200</sup> the Court expressly overruled *Wilko v. Swan* in 1989.<sup>201</sup> Writing for a 5-4 majority, Justice Kennedy wrote, “To the extent that *Wilko* rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.”<sup>202</sup> The Court rejected the plaintiff’s argument that arbitration proceedings force participants to forgo substantive rights afforded by the statute upon which they bring their claim,<sup>203</sup> and noted that the enforcement of arbitration agreements produces a result by which both the policies of the FAA and the relevant statute are implemented.<sup>204</sup> With this decision, the Court’s approach to arbitration became one of deference and enforcement.<sup>205</sup>

In 1995, in *Allied-Bruce Terminix Cos. v. Dobson*, the Supreme Court further considered the FAA’s reach in analyzing whether the FAA applied to a contract containing a mandatory arbitration agreement between an Alabama homeowner and the local office of the Allied-Bruce Terminix Companies.<sup>206</sup> The plaintiff argued that the agreement fell within the scope of an Alabama statute providing that written pre-dispute arbitration agreements are invalid and unenforceable.<sup>207</sup> The Supreme Court of Alabama agreed with the plaintiff, finding that although the FAA preempts

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196. *Id.* at 628.

197. 460 U.S. 1 (1983).

198. *Id.* at 24.

199. *Mitsubishi*, 473 U.S. at 625–26.

200. *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 242 (1987). The claims in this case were predicated on both the Racketeer Influenced Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–1968 (2006), and Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78 (2006). *McMahon*, 482 U.S. at 222. This case also marked the first time that the Supreme Court found claims arising under statutory rights to be arbitrable in a domestic context. See Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 951 (1999).

201. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 485 (1989).

202. *Id.* at 481.

203. *Id.*

204. *Id.* at 485.

205. See Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 674 (1996).

206. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 268 (1995).

207. See *id.*



conflicting state law, the FAA did not apply to the contract at hand because the contract did not concern interstate commerce.<sup>208</sup>

The Court reversed, finding that even if the parties did not intend the contract to have a connection to interstate commerce, the transaction need only “*in fact* involve interstate commerce” to be within the reach of the FAA.<sup>209</sup> Writing for the majority, Justice Breyer concluded that the term “involving commerce” in section 2 of the FAA “signals an intent to exercise Congress’ commerce power to the full.”<sup>210</sup> With this holding, the Court brought any transaction with connections to interstate commerce within the scope of the FAA. In addition, Justice Breyer, in dicta, extolled the virtues of arbitration in the realm of consumer protection.<sup>211</sup> He rejected the view espoused by an amicus curiae brief that disallowing arbitration would more adequately protect the interests of consumers signing form contracts, and instead found that “arbitration’s advantages often would seem helpful to individuals . . . who need a less expensive alternative to litigation.”<sup>212</sup> This remark evinces the complete shift in the Court’s approach to arbitration since the period following the passage of the FAA, when the Court’s position was that, despite the passage of the Act, arbitration inadequately shielded consumers from unfair business practices.<sup>213</sup>

In another purported collision between the FAA and statutory rights, the Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp.*<sup>214</sup> held that claims arising under the Age Discrimination in Employment Act (ADEA) were subject to mandatory arbitration.<sup>215</sup> Gilmer, a signatory to an employment agreement providing for arbitration of future controversies with the employer, was fired at the age of sixty-two, and argued primarily that mandatory arbitration would both impede the important social policies behind the ADEA and deprive him of a right to a judicial forum guaranteed under the ADEA.<sup>216</sup>

The Court rejected both of these contentions.<sup>217</sup> Writing for the majority, Justice Byron R. White found that arbitration of Gilmer’s claims would just as adequately enforce the policies for which the ADEA was

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208. See *Allied-Bruce Terminix Cos. v. Dobson*, 628 So. 2d 354, 356 (1993) (“[T]he evidence adduced by the Terminix companies does not establish that the parties contemplated substantial interstate activity when they entered the termite bond.”).

209. *Allied-Bruce*, 513 U.S. at 279. The transaction at issue ultimately involved interstate commerce to the extent that Allied-Bruce and Terminix had an interstate relationship and the materials used by Allied-Bruce were imported into Alabama from out of state. See *id.* at 282.

210. *Id.* at 277.

211. See *id.* at 280–81.

212. *Id.* at 280.

213. See *Wilko v. Swan*, 346 U.S. 427, 435 (1953).

214. 500 U.S. 20 (1991).

215. *Id.* at 23.

216. See *id.* at 27–29.

217. *Id.*

enacted as would a judicial forum.<sup>218</sup> The Court also rejected the idea that the ADEA required that claims be heard in a judicial forum, especially considering the statute's reference to the use of out-of-court methods to resolve disputes.<sup>219</sup> This decision explicitly departed from the principle, articulated first in *Wilko* and upheld in the *Alexander v. Gardner-Denver Co.* cases,<sup>220</sup> that public policy concerns provide a reason to withhold claims from the arbitration system.<sup>221</sup>

In 1996, in what one scholar describes as the “devastati[on of] virtually all state attempts to protect consumers, franchisees, and other weaker parties,”<sup>222</sup> the Supreme Court, in *Doctor's Associates, Inc. v. Casarotto*,<sup>223</sup> expanded its holding from *Southland Corp. v. Keating*<sup>224</sup> to find that the FAA preempted a state statute that imposed specific typographical requirements on arbitration agreements.<sup>225</sup> Writing for the majority, Justice Ginsburg found that under section 2 of the FAA, courts could not refuse to enforce arbitration agreements on account of laws that apply only to arbitration.<sup>226</sup> By imposing a requirement on arbitration agreements that was not imposed on other types of contracts, the Montana statute in question violated section 2 of the FAA, which expressed Congress's goal of placing arbitration agreements “‘upon the same footing as other contracts,’” and was thus preempted.<sup>227</sup> This holding greatly limited the requirements that state arbitration statutes may place on arbitration clauses.<sup>228</sup>

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218. *Id.* at 28 (“Both of these dispute resolution mechanisms . . . can further broader social purposes.”).

219. *Id.* at 29; *see also* 29 U.S.C. § 626(b) (2006) (encouraging the resolution of Age Discrimination in Employment Act (ADEA) claims through “informal methods of conciliation, conference, and persuasion”).

220. *See* 415 U.S. 36, 59–60 (1974); *supra* note 190 and accompanying text.

221. *See* Sternlight, *supra* note 205, at 671. The Court in *Gilmer* did not overturn the *Alexander-Gardner* holding, but merely pointed to disparities between that case and the case at hand. *See Gilmer*, 500 U.S. at 35; MACNEIL, *supra* note 114, at 76–77.

222. *See* Sternlight, *supra* note 205, at 667.

223. 517 U.S. 681, 688 (1996).

224. 465 U.S. 1, 16 (1984) (holding that the Federal Arbitration Act (FAA) preempts inconsistent state arbitration laws); *see also supra* note 174 and accompanying text.

225. Montana's arbitration statute required an arbitration clause to be typed in underlined capital letters on the front page of the contract to be enforceable upon the naissance of a dispute. *Doctor's Assocs.*, 517 U.S. at 684.

226. *See id.* at 687.

227. *Id.* (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)).

228. *See* Sternlight, *supra* note 205, at 668. Sternlight points out that a state may be able to provide for protective measures against arbitration agreements perceived as unfair by enacting blanket prohibitions against certain practices in all contracts, as long as arbitration agreements are not singled out. *See id.* at 668 n.176; *see also* Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court's Erroneous Statutory Interpretation, Stare Decisis, and a Proposal for Change*, 53 ALA. L. REV. 789, 880 (2002) (“[S]tates cannot give consumers the level of protection that their public policies might warrant.”); Van Wezel Stone, *supra* note 200, at 948 (“State law contract defenses to arbitration can only be raised if they are matters of general law, not if they are provisions directed at arbitration.”).

### 5. Total Enforcement: The Supreme Court's Treatment of Arbitration Since 2000

The Supreme Court in the last few years has decided several cases that have had a significant impact on the legal environment surrounding arbitration. These decisions reflect a continuation of the policy in favor of the enforcement of arbitration agreements in numerous contexts.

In 2000, in *Green Tree Financial Corp.-Alabama v. Randolph*,<sup>229</sup> the Court rejected a consumer's argument that an arbitration agreement that failed to indicate which party would be responsible for arbitration costs was not enforceable.<sup>230</sup> Larketta Randolph argued that the agreement, silent as to costs, would prevent her from adequately vindicating her rights, because she might face a situation in which the costs of arbitration were too steep.<sup>231</sup> Writing for the majority, Chief Justice William H. Rehnquist asserted that invalidation of the agreement would violate the Court's policy in favor of arbitration.<sup>232</sup> Similarly, the Court found that invalidation of the agreement would also violate the Court's requirement that the party seeking to avoid an arbitration agreement prove that arbitration is inappropriate.<sup>233</sup>

With this decision the Court began the new millennium reasserting its belief that an arbitral tribunal is as suitable a forum as a judicial tribunal for the vindication of consumers' rights.<sup>234</sup> The Court continued to enforce aspects of arbitration in 2003 in *Green Tree Financial Corp. v. Bazzle*,<sup>235</sup> holding that when an arbitration clause was silent on the issue of class-wide arbitration, the decision of whether class claims could be compelled into arbitration was for the arbitrator.<sup>236</sup> This holding greatly increased the authority granted to arbitrators.<sup>237</sup>

In 2008, the Court limited judicial review of an arbitration award in *Hall Street Associates, LLC v. Mattel, Inc.*<sup>238</sup> The parties in this case, a landlord and tenant, had included a clause in the arbitration agreement between them providing that an arbitrator's award could be reviewed for error by a court.<sup>239</sup> The Court held that parties could not contract around the FAA's provisions for review, as the grounds delineated in the FAA were the sole

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229. 531 U.S. 79 (2000).

230. *See id.* at 89–92.

231. *Id.* at 90.

232. *Id.* at 91.

233. *Id.* at 91–92.

234. *See id.* at 90; *see also* Pittman, *supra* note 228, at 882 (“To the extent that a consumer purchaser is less likely to meet the burden of proving that the arbitration costs are prohibitive, *Green Tree* is a pro-arbitration decision.”).

235. 539 U.S. 444 (2003).

236. *See id.* at 447.

237. *See* CARBONNEAU, *supra* note 151, at 244 (noting that the holding in *Bazzle* “extends the reach of the arbitrator’s discretion, limits the role of the courts in regard to the arbitral process, and enhances the systemic autonomy of arbitration”).

238. 552 U.S. 576, 584 (2008).

239. *See id.* at 579–80; *see also* CARBONNEAU, *supra* note 151, at 253 (noting that the ruling in *Hall Street* was expected “to resolve the split between the federal circuits regarding the validity and enforceability of opt-in provisions”).

means for obtaining review.<sup>240</sup> This decision reaffirmed the supremacy of the FAA by limiting the ability of parties voluntarily to opt out of the FAA's requirements.<sup>241</sup>

In June 2010, the Court again weighed in on the enforceability of specific provisions in arbitration clauses in *Rent-a-Center, West, Inc. v. Jackson*.<sup>242</sup> In an employment discrimination suit in which the plaintiff alleged violations of the Civil Rights Act of 1991,<sup>243</sup> the parties had signed an arbitration clause that included a provision mandating that any question about the interpretation or applicability of the arbitration agreement be resolved by the arbitrator.<sup>244</sup> The employee, Antonio Jackson, argued that the agreement was unconscionable.<sup>245</sup> In response, Rent-a-Center argued that the question of the unconscionability of the agreement could not properly be heard by the court but must be decided by the arbitrator.<sup>246</sup> The Court rejected Jackson's argument, finding that only the arbitrator, and not the court, could decide the question of unconscionability of the agreement.<sup>247</sup> Because the Court found that the plaintiff was challenging the validity of the contract as a whole, the challenge was properly before the arbitrator and not a court.<sup>248</sup>

In April 2010, the Court decided *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,<sup>249</sup> a decision that emphasized the necessity of consent in agreements to arbitrate.<sup>250</sup> Evaluating an arbitration clause silent on the issue of class arbitration,<sup>251</sup> the Court held that the defendant company could not compel the plaintiffs to arbitrate as a class because the parties had not previously agreed to class arbitration.<sup>252</sup> The Court repeatedly referred to "the consensual nature" of arbitration and the importance of the parties' intent.<sup>253</sup> Notably, the Court also held that the arbitration panel "exceeded its powers," which was grounds for vacatur under section 10(a)(4) of the FAA.<sup>254</sup> Because the Court found that the panel ignored relevant law and instead "imposed its own conception of sound policy," the Court vacated the award.<sup>255</sup>

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240. See *Hall Street*, 552 U.S. 585–89.

241. See *id.*; see also CARBONNEAU, *supra* note 151, at 254 ("Hall Street Associates is unquestionably a favorable-to-arbitration ruling. . . . There is . . . no question about the legitimacy of arbitration or its function in either the majority or dissenting opinions.").

242. 130 S. Ct. 2772, 2779 (2010).

243. 42 U.S.C. § 1981 (2006).

244. *Rent-a-Center*, 130 S. Ct. at 2775.

245. *Id.*

246. *Id.*

247. *Id.* at 2779.

248. *Id.* The Court pointed out, however, that if a party challenges the validity of the agreement to arbitrate in particular, judicial review is required. *Id.* at 2778.

249. 130 S. Ct. 1758 (2010).

250. See *id.* at 1774.

251. *Id.* at 1766.

252. *Id.* at 1775.

253. See *id.* at 1774.

254. *Id.* at 1770.

255. *Id.* at 1776.

In November 2010, the Supreme Court heard arguments in the case of *AT & T Mobility LLC v. Concepcion*.<sup>256</sup> The case addressed a conflict between the FAA and a California state court's decision that an arbitration agreement prohibiting class arbitration was unconscionable.<sup>257</sup> Some commentators have expressed that a potential win for AT & T would be "grossly unfair,"<sup>258</sup> while others have touted the virtues of finding in favor of AT & T and therefore in favor of the supremacy of the FAA.<sup>259</sup>

A recent case in the Southern District of New York demonstrates the compliance of lower courts with the Supreme Court's current arbitration policy. In November 2010, a federal judge upheld a record-setting judgment of \$20.6 million against Goldman Sachs,<sup>260</sup> rejecting the defendant's argument that the arbitration panel had exceeded its powers in granting such a large award.<sup>261</sup>

Similarly, the Dodd-Frank Act,<sup>262</sup> enacted in July 2010, is another recent development in arbitration law.<sup>263</sup> Concern about financial customs in the current economy led to the enactment of this legislation in an effort to proscribe numerous practices considered problematic.<sup>264</sup> Among other things, the Act created a new Bureau of Consumer Financial Protection.<sup>265</sup> The Act explicitly grants the new agency the power to prohibit or impose conditions or limitations on the use of mandatory pre-dispute arbitration agreements.<sup>266</sup> Specifically, the Act requires the agency to study "the use

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256. See *Laster v. AT & T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), *cert. granted sub nom.* *AT & T Mobility LLC v. Concepcion*, 130 S. Ct. 3322 (2010); Oral Argument, *AT & T Mobility LLC v. Concepcion*, 130 S. Ct. 3322 (No. 09-893), available at [http://www.oyez.org/cases/2010-2019/2010/2010\\_09\\_893](http://www.oyez.org/cases/2010-2019/2010/2010_09_893).

257. See *Laster*, 584 F.3d at 854–55.

258. Editorial, *The Arbitration War*, N.Y. TIMES, Nov. 27, 2010, at A18.

259. See Robin Conrad, *AT & T Mobility v. Concepcion: Preserving Arbitration for Businesses and Consumers*, NAT'L REV. ONLINE (Nov. 9, 2010, 12:54 PM), <http://www.nationalreview.com/bench-memos/252893/iatt-mobility-v-concepcioni-preserving-arbitration-businesses-and-consumers-robin#> ("Consumers who have legitimate grievances deserve access to the expedient and user-friendly system that Congress has already declared should be available as a contractual alternative to litigation.").

260. See *Goldman Sachs Execution & Clearing, L.P. v. Official Unsecured Creditors' Comm. of Bayou Grp., LLC*, No. 10 Civ. 5622 (JSR), 2010 WL 4877847, at \*5 (S.D.N.Y. Nov. 30, 2010).

261. See *id.*; see also Susanne Craig, *Judge Upholds Award Against Goldman*, N.Y. TIMES DEALBOOK (Nov. 8, 2010, 11:29 AM), <http://dealbook.nytimes.com/2010/11/08/judge-upholds-award-against-goldman/?scp=1&sq=rakoff%20arbitration&st=cse>.

262. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of titles 7, 12, and 15 U.S.C.).

263. See *id.* § 1028, 124 Stat. at 2003 (providing for analysis and rulemaking in the field of mandatory consumer arbitration).

264. Brady Dennis, *Congress Passes Financial Reform Bill*, WASH. POST (July 16, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/15/AR2010071500464.html?sid=ST2010071504699>.

265. See Dodd-Frank Act § 1011, 124 Stat. at 1964.

266. See *id.* § 1028, 124 Stat. at 2003–04; see also Budnitz, *supra* note 25, at 1204–05 ("[T]he new agency should determine if arbitrations 'promote fair adjudication and effective redress' and should ban the clauses if necessary." (quoting DEP'T OF THE TREASURY, FINANCIAL REGULATORY REFORM, A NEW FOUNDATION: REBUILDING FINANCIAL

of agreements providing for arbitration of any future dispute . . . in connection with the offering or providing of consumer financial products or services.”<sup>267</sup> Based on the results of the study, the agency may decide to impose limitations on pre-dispute consumer arbitration agreements, but may not impose restrictions on voluntary post-dispute consumer arbitration agreements.<sup>268</sup>

#### *D. Federal Statutory Claims, the FAA, and the Courts*

As discussed above, the Supreme Court has subjected claims under numerous federal statutes to arbitration.<sup>269</sup> Courts examining whether or not arbitration agreements are enforceable when dealing with such claims typically apply the test delineated by the Supreme Court in *Shearson/Am. Express, Inc. v. McMahon*.<sup>270</sup> There, the Court held that to overcome the presumption in favor of arbitrability, the relevant statute must indicate Congressional intent to prohibit arbitration.<sup>271</sup> Such intent is to be determined by examination of the text and legislative history of the statute, as well as a consideration of whether an inherent conflict exists between the underlying purposes of the statute and arbitration.<sup>272</sup>

While the Supreme Court has held that the statutory rights of consumers are protected equally by arbitration and litigation,<sup>273</sup> some federal statutes explicitly limit the enforceability of arbitration provisions in consumer agreements.<sup>274</sup> For example, the John Warner National Defense Authorization Act prohibits the enforcement of an arbitration clause in a consumer credit agreement signed by a covered member of the armed forces or the member’s dependent.<sup>275</sup> Similarly, in 2002, Congress passed the Motor Vehicle Franchise Contract Dispute Resolution Process Act.<sup>276</sup> This statute requires the written consent of all parties to a dispute to submit their claims to arbitration, regardless of whether the parties had already

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SUPERVISION AND REGULATION 62, available at [http://permanent.access.gpo.gov/LPS113933/LPS113933/www.financialstability.gov/docs/regs/FinalReport\\_web.pdf](http://permanent.access.gpo.gov/LPS113933/LPS113933/www.financialstability.gov/docs/regs/FinalReport_web.pdf) (last visited Apr. 20, 2010)).

267. Dodd-Frank Act § 1028(a), 124 Stat. at 2003–04.

268. *Id.* § 1028(b)–(c), 124 Stat. at 2004.

269. *See supra* Part II.C.

270. *See Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 227 (1987); *see also supra* note 200 and accompanying text.

271. *See McMahon*, 482 U.S. at 227.

272. *Id.*

273. *See Speidel, supra* note 19, at 1086 (“[M]ost statutory claims . . . are capable of final settlement by private agreement . . . . The decision to withhold a statutory claim from arbitration should be made by Congress at the time the right is created . . . .”); *supra* Part II.C.4–5.

274. *See F. PAUL BLAND, JR. ET AL., CONSUMER ARBITRATION AGREEMENTS: ENFORCEABILITY AND OTHER TOPICS* app. A.2, at 278 (5th ed. 2007).

275. 10 U.S.C. § 987(f)(4) (2006).

276. Pub. L. No. 107-273, § 11028, 116 Stat. 1835, 1835–36 (2002) (codified at 15 U.S.C. § 1226 (2006)).

entered into a pre-dispute agreement to arbitrate.<sup>277</sup> The Act applies to contracts between car dealers and franchisors.<sup>278</sup>

While these provisions clearly limit the enforcement of arbitration clauses, ambiguity exists as to whether claims arising under other statutes can be forced into arbitration pursuant to a signed arbitration agreement.<sup>279</sup> For example, the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (MMWA),<sup>280</sup> designed to protect consumers in signing agreements for product warranties,<sup>281</sup> allows warrantors to mandate that consumers submit claims arising under the MMWA to informal dispute resolution mechanisms.<sup>282</sup> The MMWA expressly states that these informal processes must be non-binding and that consumers retain the right to bring MMWA claims in court.<sup>283</sup> For this reason, some courts have held that the MMWA prohibits binding arbitration.<sup>284</sup> Two appellate courts, however, have reversed lower court decisions precluding binding arbitration of MMWA claims and have held that arbitration agreements under the MMWA are enforceable.<sup>285</sup>

A clash between the FAA and the U.S. Bankruptcy Code raises similar questions.<sup>286</sup> The Bankruptcy Code grants to district courts original and exclusive jurisdiction over certain matters.<sup>287</sup> A conflict has developed over whether this means that all claims under the Bankruptcy Code must be heard in a district court and therefore that all relevant arbitration provisions are unenforceable.<sup>288</sup> Most courts have compelled arbitration of claims

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277. 15 U.S.C. § 1226(a)(2).

278. *Id.* § 1226(a)(1)(B); *see also* BLAND ET AL., *supra* note 274, app. A.2.2, at 279.

279. *See* BLAND ET AL., *supra* note 274, § 4.2.1.1, at 56–57.

280. 15 U.S.C. §§ 2301–2312.

281. *See* Andrew P. Lamis, *The New Age of Artificial Legal Reasoning as Reflected in the Judicial Treatment of the Magnuson-Moss Act and the Federal Arbitration Act*, 15 LOY. CONSUMER L. REV. 173, 184 (2003) (describing the statute as “a reaction to the inability of consumers to bargain over and meaningfully consent to the terms of a product warranty”).

282. *See* BLAND ET AL., *supra* note 274, § 4.2.2.1, at 58; *see also* 15 U.S.C. § 2310(a)(3).

283. *See* 15 U.S.C. § 2310(a)–(d).

284. *See, e.g.,* Browne v. Kline Tysons Imps., Inc., 190 F. Supp. 2d 827, 831 (E.D. Va. 2002) (“Any informal dispute settlement procedure that may be utilized to resolve written warranty disputes under the [Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (MMWA)] must be a non-binding mechanism, which serves as a prerequisite, and not a bar, to relief in court.”); Pitchford v. Oakwood Mobile Homes, Inc., 124 F. Supp. 2d 958, 964–65 (W.D. Va. 2000) (“The clear intent of Magnuson-Moss . . . is to encourage alternate dispute settlement mechanisms, but to not deprive any party of their right to . . . a judicial forum.”).

285. *See* Davis v. S. Energy Homes, Inc., 305 F.3d 1268, 1273–77 (11th Cir. 2002) (looking at the text, legislative history, and underlying purposes of the MMWA and finding that none of these factors indicated Congress’s intent to prohibit binding arbitration); Walton v. Rose Mobile Homes LLC, 298 F.3d 470, 478 (5th Cir. 2002) (“Consumers can still vindicate their rights under warranties in an arbitral forum . . . Arbitration is not inherently unfair to consumers.”).

286. *See* BLAND ET AL., *supra* note 274, § 4.2.3, at 70–73.

287. *See* 28 U.S.C. § 1334 (2006).

288. *See* BLAND ET AL., *supra* note 274, § 4.2.3.2–4, at 70–72; *see also* Mette H. Kurth, Comment, *An Unstoppable Mandate and an Immovable Policy: The Arbitration Act and the Bankruptcy Code Collide*, 43 UCLA L. REV. 999, 1002 (1996) (“The cases [addressing

relating to non-core matters of bankruptcy issues,<sup>289</sup> while granting that courts have discretion over the enforceability of arbitration of core matters.<sup>290</sup> Similar conflicts have developed in relation to the False Claims Act (FCA)<sup>291</sup> and the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA).<sup>292</sup>

### III. THE CREDIT REPAIR ORGANIZATIONS ACT IN COURT: THE SPLIT OVER WHETHER A COURT MAY COMPEL A CONSUMER TO ARBITRATE CLAIMS UNDER THE CREDIT REPAIR ORGANIZATIONS ACT

This part examines the circuit split over the enforceability of arbitration agreements under the CROA. It analyzes the different approaches taken by courts, as well as scholarly opinions supporting each side.

While the Supreme Court has decided many cases concerning the arbitrability of rights granted by federal statutes,<sup>293</sup> few federal circuit courts have weighed in on whether claims under the CROA specifically are arbitrable. In addition to those circuit courts that have addressed the split, a number of cases in district courts have dealt with the issue as well. Those courts that have confronted the issue have resolved it in one of two conflicting ways: compelling arbitration<sup>294</sup> or prohibiting arbitration.<sup>295</sup> The controversy springs from the CROA's mandated disclosure that consumers have the "right to sue"<sup>296</sup> and its repeated references to courts, but its lack of explicit language mandating that claims be heard in a judicial forum.<sup>297</sup>

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whether bankruptcy claims can be arbitrated] differ markedly in their treatment of core proceedings, policy, efficiency concerns, and balancing tests.").

289. *See* Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 885 F.2d 1149, 1157 (3d Cir. 1989) (holding that "the text of the Bankruptcy Code embodies the principle that pre-petition contract rights are enforceable in a bankruptcy proceeding" and enforcing arbitration of claims). *But see In re Guild Music Corp.*, 100 B.R. 624, 628 (Bankr. D.R.I. 1989) (holding that the court has discretion to refuse to enforce the arbitration of non-core matters).

290. *See* MBNA Am. Bank, N.A. v. Hill, 436 F.3d 104, 110–11 (2d Cir. 2006) (denying motion to compel arbitration). *But see* James P. Barkman, Inc. v. Granger Constr. Co. (*In re* James P. Barkman, Inc.), 170 B.R. 321, 323 n.1 (Bankr. E.D. Mich. 1994) (noting in dicta that the core/non-core distinction is irrelevant).

291. 31 U.S.C. § 3730(h)(2) (2006). *Compare* Nguyen v. City of Cleveland, 121 F. Supp. 2d 643, 644 (N.D. Ohio 2000) (declining to compel arbitration of FCA claims), *with* United States v. Bankers Ins. Co., 245 F.3d 315, 325 (4th Cir. 2001) (compelling arbitration of FCA claims).

292. 34 U.S.C. § 4302(b) (2006). *Compare* Lopez v. Dillard's, Inc., 382 F. Supp. 2d 1245, 1248 (D. Kan. 2005) (refusing to compel arbitration of Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) claims), *with* Landis, O.D. v. Pinnacle Eye Care, LLC, 537 F.3d 559, 562–63 (6th Cir. 2008) (enforcing arbitration of USERRA claims, largely because the language and legislative history of the statute is silent as to arbitration, and there is no inherent conflict between arbitration and the purposes of USERRA), *and* Garrett v. Circuit City Stores, Inc., 449 F.3d 672, 681 (5th Cir. 2006).

293. *See supra* Part II.C.

294. *See infra* Part III.A.

295. *See infra* Part III.B.

296. 15 U.S.C. § 1679c(a) (2006).

297. *See* Ropiequet & Hirsh, *supra* note 59, at 14, 18–20.



A. *Under the CROA, Mandatory Arbitration Clauses Are Enforceable*

Before August 2010, the only circuit courts to address this conflict had compelled arbitration of CROA claims.<sup>298</sup> This section examines the cases that have produced these decisions and analyzes the reasoning that has led these courts to hold that the CROA does not prohibit mandatory arbitration.

1. The Third Circuit

The first circuit court to weigh in on the issue of the arbitrability of claims under the CROA was the Third Circuit in 2007 in *Gay v. CreditInform*.<sup>299</sup> Mary Gay purchased credit repair services from CreditInform and Intersections, Inc., seeking to monitor and improve her credit history.<sup>300</sup> After eight months of making monthly payments of \$4.99 to Intersections,<sup>301</sup> she received no services or benefits.<sup>302</sup> Gay sued Intersections for violations of the CROA, specifically for requiring payment before services were rendered and for requiring a waiver of rights to which Gay was entitled under the CROA.<sup>303</sup> Additionally, Gay argued that Intersections failed to make the required disclosures under the CROA.<sup>304</sup> Intersections filed a motion to stay proceedings and compel arbitration, in accordance with an arbitration agreement Gay had signed upon purchasing Intersections's services.<sup>305</sup> The district court granted the defendants' motion in light of the arbitration agreement, stayed the case, and ordered the parties to arbitrate the claims in question on an individual basis.<sup>306</sup>

Gay contended that by means of the nature of her claims under the CROA, she had an automatic right to sue in court.<sup>307</sup> She asserted that references in section 1679g of the CROA to a "court" confirmed her right to avoid arbitration.<sup>308</sup> She identified section 1679c(a), which requires a

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298. *See id.* at 21 ("[T]here is a much clearer trend in favor of finding that CROA claims are arbitrable . . .").

299. 511 F.3d 369, 375 (3d Cir. 2007) ("The Supreme Court and, as far as we are aware, no court of appeals has addressed the issues that we now address under the CROA.").

300. *See id.*

301. *Id.* CreditInform is a registered trademark of Capital One, used to market products and services of Capital One, which are ultimately provided by Intersections. Although the suit initially named CreditInform as a defendant along with Intersections, Gay voluntarily dismissed CreditInform from the suit. *See id.* at 374 n.1.

302. *See id.* at 375.

303. *See id.* at 374–75.

304. *See id.* at 375.

305. The arbitration agreement stated, "Any claim arising out of or relating to the Product shall be settled by binding arbitration in accordance with the commercial arbitration rules of the American Arbitration Association on an individual basis not consolidated with any other claim." *Id.*

306. *See id.*

307. *See id.* at 376–78.

308. *See id.* For example, the statute states that punitive damages are awarded "as the court may allow"; that class actions are calculated by an amount which "the court may allow"; and that the "court shall consider" several factors in determining the amount of punitive damages to be awarded. *See* 15 U.S.C. § 1679g (2006).

credit repair organization to inform consumers that they have a “right to sue” for any violation of the CROA, as additional support for this claim.<sup>309</sup>

Intersections argued that the CROA does not provide a right to sue in a judicial forum and that even if this right did exist, the statute does not prevent a consumer from waiving such right under the statute.<sup>310</sup> According to this reasoning, when Gay signed the agreement to arbitrate, she lost any right she may have had to sue in a judicial forum.<sup>311</sup>

The Third Circuit agreed with Intersections and rejected Gay’s claims.<sup>312</sup> The court followed its holding in *Johnson v. West Suburban Bank*<sup>313</sup> in resolving the dispute. There, having found that the legislative history of TILA did not demonstrate an intent to preclude arbitration, the court held that there was no irreconcilable conflict between TILA’s purposes and arbitration of such claims.<sup>314</sup> Similarly, the court in *Gay* found that even though the CROA’s language reflects an assumption that claims will be brought in a judicial forum, the statute does not create an independent right to such forum nor does it indicate that such a right cannot be waived by an arbitration agreement.<sup>315</sup>

The Third Circuit also based its decision on Supreme Court precedent, finding that the anti-waiver provision in the CROA is equivalent to those in both RICO and the Securities Exchange Act.<sup>316</sup> As a result, the court held that the anti-waiver provision of the CROA covered only the substantive obligations imposed by the statute and not the procedural requirements.<sup>317</sup> Based on this reasoning, the court affirmed the district court’s order compelling arbitration of Gay’s CROA claims.<sup>318</sup>

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309. See *Gay*, 511 F.3d at 377 n.4. The court dispensed with this argument in a footnote, because “the section does not specify the forum for the resolution of the dispute and therefore does not support Gay’s argument that the CROA provides a consumer with the right to bring suit in a judicial, rather than arbitral, forum for CROA violations.” *Id.*

310. See *id.* at 378.

311. *Id.*

312. *Id.* at 385.

313. 225 F.3d 366 (3d Cir. 2000). This case considered the issue of whether claims arising under TILA, see *supra* Part I.A.1, may be subject to mandatory arbitration in lieu of class action litigation. The plaintiff argued that repeated references to “class actions” within the statute granted to consumers the right to file claims as class actions and overrode agreements to arbitrate on an individual basis. See *id.* at 369, 371, 377–78; see also *Gay*, 511 F.3d at 379.

314. See *Gay*, 511 F.3d at 381 (“The notion that there is a meaningful distinction between vindicating a statute’s social purposes and adjudicating private grievances for the purposes of determining whether a statute precludes compelling arbitration under a valid arbitration clause was rejected by the Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp.*” (quoting *Johnson*, 225 F.3d at 374)).

315. See *id.* at 382. The court called this assumption “hardly surprising,” as an individual who believes she is the victim of a wrong will ordinarily have a right to sue in court. *Id.*

316. See *Rodriguez de Quijas v. Shearson/Am. Express Inc.*, 490 U.S. 477, 482–83 (1989); *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 231–34 (1987); *supra* Part II.C.4.

317. See *Gay*, 511 F.3d at 382–85.

318. See *id.* at 395.

## 2. The Eleventh Circuit

In 2009, the Eleventh Circuit addressed this conflict in *Picard v. Credit Solutions, Inc.*<sup>319</sup> and followed the Third Circuit's lead, holding that the CROA does not preclude arbitration.<sup>320</sup> The plaintiff in the case was a customer of Credit Solutions (CSA), a company purporting to lower clients' debts by negotiating with unsecured creditors.<sup>321</sup> Picard, facing increasing debt and persistent creditors, electronically entered into an agreement for CSA's services, which contained a mandatory arbitration clause.<sup>322</sup> Less than a month later, creditors began calling Picard to report that she had defaulted on her accounts.<sup>323</sup> She filed for Chapter 7 bankruptcy and filed suit against CSA in the U.S. District Court for the Northern District of Alabama.<sup>324</sup> The district court rejected CSA's motion to compel arbitration, finding that the arbitration clause was void under the CROA.<sup>325</sup> On appeal, CSA argued that the CROA does not preclude arbitration,<sup>326</sup> while Picard argued that she should not be forced to arbitrate because the CROA entitled her to a suit in court.<sup>327</sup>

The Eleventh Circuit found that the CROA does not create a contractually unwaivable right to sue in court.<sup>328</sup> The court acknowledged its adherence to Supreme Court holdings indicating an inclination to enforce arbitration clauses, and noted that the clause at hand was unenforceable only upon a finding that Congress had intended to prohibit waiver of a judicial forum.<sup>329</sup> In resolving this question, the court followed the lead of the Third Circuit in adhering to the decisions interpreting arbitration clauses under the Securities Act and RICO, finding that these cases supported the defendant's position that the statute in question did not prohibit arbitration.<sup>330</sup>

Additionally, the court held that the only right created in the disclosure provision of the CROA was the right to be told certain information.<sup>331</sup> Because the "right to sue" was not mentioned in the civil liability section of the CROA, the statute placed no limitation on arbitration.<sup>332</sup> The court found that even if a statute requires organizations to inform consumers of

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319. 564 F.3d 1249, 1254 (11th Cir. 2009) ("Whether CROA prohibits arbitration is an issue of first impression in this Court.").

320. *Id.* at 1255. With this holding, the U.S. Court of Appeals for the Eleventh Circuit reversed a district court's contrary holding. *Id.*, rev'g *Reynolds v. Credit Solutions, Inc.*, 541 F. Supp. 2d 1248, 1258–60 (N.D. Ala. 2008).

321. *See id.* at 1251.

322. *See id.*

323. *See id.* at 1251–52.

324. *See id.* at 1252.

325. *See id.*

326. *See id.*

327. *See id.*

328. *See id.* at 1255.

329. *See id.* at 1253.

330. *See id.* at 1255; *supra* Part II.C.4.

331. *See Picard*, 564 F.3d at 1255.

332. *Id.*

the right to a private action, such disclosure does not preclude waiver of that right.<sup>333</sup> The court overturned the district court's refusal to compel arbitration and ordered Picard to submit her claims to arbitration.<sup>334</sup>

### 3. The Sixth Circuit

A case from the U.S. District Court for the Western District of Michigan followed this line of reasoning, holding that CROA claims are arbitrable pursuant to a mandatory arbitration agreement.<sup>335</sup> The case involved a debt settlement company that entered into an agreement with the plaintiff, Revialo Rex, to provide debt settlement services.<sup>336</sup> Instead of receiving the repair to his credit that he sought, Rex learned of two lawsuits filed against him by Citibank stemming from his failure to make payments.<sup>337</sup> Rex filed a complaint with the Better Business Bureau, at which point CSA offered to refund the fees Rex had already paid.<sup>338</sup> Because Rex agreed to this settlement with CSA, the Bureau closed the investigation;<sup>339</sup> thereafter Rex filed suit for violations of the CROA.<sup>340</sup>

Noting the federal policy of resolving disputes in favor of arbitration,<sup>341</sup> the district court embarked on an evaluation of the statute's text and legislative history, and an examination of whether there was an inherent conflict between arbitration and the statute's purposes.<sup>342</sup> The court observed that the civil liability section of the CROA establishes no particular forum in which claims should be brought.<sup>343</sup> Furthermore, the court explicitly rejected the opinion of a district court in Texas that the mention of a "right to sue" in section 1679c—the required disclosures provision of the CROA—sets forth an independent right.<sup>344</sup> The court stated that the disclosure requirements do not provide consumers with any rights beyond that of the required disclosures, which merely establish wording that must be employed in communicating with consumers and describing their rights under other sections of the CROA.<sup>345</sup> For these

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333. *Id.* (stating that the CROA "simply does not create a right to sue only in a judicial forum").

334. *Id.* at 1256. The Court explicitly stated that "[t]he substantive rights created in CROA are entirely preserved in an arbitral forum." *Id.* at 1255.

335. *Rex v. CSA-Credit Solutions of Am., Inc.*, 507 F. Supp. 2d 788, 800 (W.D. Mich. 2007).

336. *See id.* at 792.

337. *See id.* Citibank prevailed against Rex in both lawsuits. *See id.*

338. *See id.*

339. *See id.*

340. *See id.*

341. *See id.* at 793 (arbitration clauses should be enforced "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute" (quoting *Highlands Wellmont Health Network, Inc. v. John Deere Health Plan, Inc.*, 350 F.3d 568, 576–77 (6th Cir. 2003))).

342. *See id.* at 797.

343. *See id.* at 798.

344. *See id.* at 798–99; *Alexander v. U.S. Credit Mgmt.*, 384 F. Supp. 2d 1003, 1010 (N.D. Tex. 2005); *see also infra* Part III.B.1.

345. *See Rex*, 507 F. Supp. 2d at 799.

reasons, the court found that nothing in the text of the statute indicated that arbitration of CROA claims was prohibited.<sup>346</sup>

The court did not examine the legislative history of the CROA, as neither party had pointed to language in the legislative history to illuminate the issue.<sup>347</sup> In analyzing whether the goals of the statute and arbitration conflicted, the court found that no conflict existed because the Supreme Court had enforced arbitration of claims under statutes whose intent was to provide increased consumer protection.<sup>348</sup>

The Western District of Michigan followed this reasoning in *Vegter v. Forecast Financial Corp.*,<sup>349</sup> holding that under the CROA, a mandatory arbitration agreement with a debt reduction company was enforceable. Without a decision from the Sixth Circuit on the issue, however, these district court cases have narrow precedential value.

#### 4. The Eighth Circuit

The only court within the Eighth Circuit to confront this issue has held that arbitration agreements may be enforced under the CROA.<sup>350</sup> In 2007, the U.S. District Court for the District of Nebraska examined plaintiff Richard Schreiner's claim of CROA violations against Credit Advisors, a debt-management service operating in Omaha.<sup>351</sup> Quoting the language of the Western District of Michigan in *Rex* that the use of separate sections setting forth required disclosures and civil liability indicated that the disclosures did not constitute an independent right, the court stated that the only evidence of congressional intent to void arbitration clauses under the CROA was "the word 'sue' and the reference to district courts."<sup>352</sup> Thus, the court "adopt[ed] the analysis and conclusion in *Rex v. CSA* that claims brought under the CROA are arbitrable."<sup>353</sup>

#### 5. In Favor of Enforceability

Those courts that have held that the CROA does not preclude arbitration have generally based their holdings on both the lack of explicit language to the contrary and the similarity of the conflict to existing Supreme Court precedent, finding that fidelity to such precedent mandates allowing arbitration agreements in credit repair contracts. Several scholars who advocate for the continued enforcement of consumer arbitration clauses

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346. *See id.* at 799.

347. *See id.* at 800.

348. *See id.* ("[T]he Supreme Court has repeatedly enforced arbitration of statutory claims where the underlying purpose of the statutes are to protect and inform consumers." (quoting *Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268, 1276 (11th Cir. 2002))).

349. No. 1:07-CV-279, 2007 WL 4178947, at \*5 (W.D. Mich. Nov. 20, 2007).

350. *Schreiner v. Credit Advisors, Inc.*, No. 8:07CV78, 2007 WL 2904098, at \*11 (D. Neb. Oct. 2, 2007); *see also supra* notes 1–19 and accompanying text.

351. *See Schreiner*, 2007 WL 2904098 at \*1.

352. *See id.* at \*11.

353. *See id.*

support this policy. Arguments in support of pre-dispute consumer arbitration include cost-saving contentions<sup>354</sup> and freedom of contract logic.<sup>355</sup> These scholars argue that arbitration enables businesses to save money on the costs of resolving disputes, and as a result of competition between companies, these savings are passed on to consumers.<sup>356</sup> Others point out that principles of contract law invalidating adhesionary or unconscionable contracts adequately protect consumers from being compelled to arbitrate in unfair situations.<sup>357</sup> Consequently, there should be no other grounds to invalidate agreements that meet the requirements of fairness under contractual principles.<sup>358</sup>

Scholars also point to the original impetus for the widespread use of arbitration, arguing that the delays, expense, and rigidity of judicial tribunals repel many from seeking legal recourse.<sup>359</sup> They argue that the Supreme Court has made a value judgment that arbitration is an adequate solution to these problems, a decision stemming purely from a belief in the merits of arbitration,<sup>360</sup> and that the problems inherent in arbitration remain problematic in judicial proceedings as well.<sup>361</sup>

#### *B. Under the CROA, Mandatory Arbitration Clauses Are Not Enforceable*

The Ninth Circuit is the only circuit court to hold that mandatory arbitration agreements under the CROA are void and unenforceable. Similarly, a district court in the U.S. Court of Appeals for the Fifth Circuit, the first court to address the conflict, held that claims under the CROA are

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354. See Brief of Consumer Data Industry Association as Amicus Curiae Supporting Petitioners at 16, *CompuCredit Corp. v. Greenwood*, 615 F.3d 1204 (9th Cir. 2010) (No. 10-948) (“[A]rbitration agreements permit [businesses] to predictably manage their litigation costs for any disputes related to their products and services.”); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 90 (“[J]udicial regulation of consumer arbitration agreements imposes costs on consumers.”).

355. See Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington & Haagen)*, 29 McGEORGE L. REV. 195, 211–12 (1998) (“Companies using arbitration are *exploiting* consumers. . . . [T]he company is exploiting the consumer’s desire for something the company has in order to get . . . a promise to arbitrate. And the consumer is exploiting the company’s desire for something the consumer has (typically money) in order to get something from the company.”).

356. See generally Ware, *supra* note 354.

357. See Carbonneau, *Triumph*, *supra* note 19, at 400 (“Parties in the marketplace should be at liberty to agree to any exchange to which they mutually consent . . . . Coerced agreements are not consensual undertakings; the authority of law cannot be used to give them effect.”).

358. See *id.* at 414–17 (suggesting ways to ensure that arbitration agreements meet contract fairness requirements).

359. See Carbonneau, *Revolution*, *supra* note 19, at 265.

360. See *id.* at 264 (“Neither quiet moneyed interests nor vocal special interests groups have imposed an agenda on, or influenced, the Court. The policy favoring arbitration appears to be a purely judicial policy, instituted to achieve the ends of the legal system.”).

361. See Carbonneau, *Triumph*, *supra* note 19, at 413 (“[Party inequality problems] are not exclusive to arbitration—they exist among unequal parties in the process of judicial litigation . . . .”).

not subject to mandatory arbitration. This section considers the reasoning followed by these courts in finding that the CROA precludes arbitration.

### 1. The Fifth Circuit

In 2005, the U.S. District Court for the Northern District of Texas decided *Alexander v. U.S. Credit Management, Inc.*,<sup>362</sup> holding that claims under the CROA cannot be forced into arbitration. A class of customers brought suit against U.S. Credit Management (USCM) for violations of the CROA disclosure and fee payment requirements.<sup>363</sup> While the court acknowledged the policy established by the Supreme Court in favor of arbitration and that the arbitration agreement met the first step of the circuit's two-step evaluation of arbitration,<sup>364</sup> the court found merit in the plaintiffs' argument that an intention of Congress to prevent the waiver of judicial remedies can override the policy of the FAA.<sup>365</sup>

The court stated that the CROA grants four rights, one of which is "the right to sue."<sup>366</sup> The court read this term in the disclosure provision alongside the non-waiver provision to find that a waiver of judicial remedies is unenforceable under the CROA, determining that mention of the "right to sue" demonstrates Congress's intent to preclude arbitration.<sup>367</sup>

In explaining why a "right to sue" is not provided by mandatory arbitration, the court identified arbitration and litigation as fundamentally distinct.<sup>368</sup> Using the definitions of both "arbitration" and "sue" stated in *Black's Law Dictionary* and *Corpus Juris Secundum*, the court emphasized that a lawsuit is defined as a proceeding occurring "in a court of law," and that "arbitration is not a judicial proceeding."<sup>369</sup> The court maintained that Congress would not require rights to be explained to consumers and then allow the waiver of such rights.<sup>370</sup>

The court distinguished the Supreme Court precedent upholding the arbitration of statutory claims.<sup>371</sup> The court referred to the "right to sue" language in the statute as "express language" indicating a clear intent to bar the enforcement of arbitration agreements.<sup>372</sup> The court used its own

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362. 384 F. Supp. 2d 1003, 1016 (N.D. Tex. 2005).

363. *See id.* at 1004–05.

364. *See id.* at 1006 ("First, courts determine whether the parties agreed to arbitrate their disputes, considering (a) the validity of the agreement to arbitrate, and (b) whether the agreement encompasses the dispute between the parties. Second, courts 'must consider whether any federal statute or policy renders the claims nonarbitrable.'" (quoting *R.M. Perez & Assoc. v. Welch*, 960 F.2d 534, 538 (5th Cir. 2002)).

365. *See id.* at 1008.

366. *Id.* at 1011–12.

367. *See id.* at 1012.

368. *See id.* at 1011 ("The act of suing in a court of law is distinctly different from arbitration.").

369. *See id.*

370. *See id.* at 1012.

371. *See id.* at 1012–15 (stating that these statutes lacked the congressional intent of the CROA as well as the broad anti-waiver provisions); *see also supra* Part II.C.4.

372. *See Alexander*, 384 F. Supp. 2d at 1014.

precedent—ultimately overturned a year after this decision—as an example of a case supporting the plaintiffs’ opinion that arbitration should not be compelled because of express language within the statute.<sup>373</sup>

Additionally, the court examined the legislative history of the CROA, pointing to what it saw as a clear intent to protect consumers.<sup>374</sup> The court cited a letter from the Chairman of the FTC stating that the bill provided a right to sue and that this provision was a valuable aspect of the CROA.<sup>375</sup> According to the court, a previous version of the bill stated that claims under the CROA should be brought in any district court.<sup>376</sup> The court interpreted the change in the language as stemming from the need to simplify the language for the average consumer’s understanding.<sup>377</sup> The court determined that the CROA’s drafters moved this language from the interior of the statute to the disclosure provision to ensure that all consumers would be aware of this right.<sup>378</sup> On these grounds, the court rejected USCM’s assertion that the arbitration agreement was enforceable and denied the motion to compel arbitration.<sup>379</sup>

## 2. The Ninth Circuit

In August 2010, the Ninth Circuit decided *Greenwood v. CompuCredit Corp.*,<sup>380</sup> thereby creating a definitive split among the circuits on this issue.<sup>381</sup> The case involved a subprime credit card offered to consumers with low credit scores advertised as a way to ameliorate credit problems.<sup>382</sup> The agreement that the plaintiffs signed prior to receiving the card contained a mandatory arbitration provision.<sup>383</sup> The plaintiffs filed suit in federal district court for violations of the CROA and California’s Unfair Competition Law after CompuCredit charged them \$257 in fees.<sup>384</sup> In denying the defendant’s motion to dismiss and compel arbitration, the district court held the arbitration clause invalid and void because the CROA protected the right to sue in court.<sup>385</sup>

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373. See *id.* at 1014 (citing *Garret v. Circuit City Stores, Inc.*, 338 F. Supp. 2d 717 (N.D. Tex. 2004), *rev’d*, 449 F.3d 672 (5th Cir. 2006), in which statutory claims arising under the USERRA could not be compelled into arbitration); see also *supra* note 292.

374. See *Alexander*, 384 F. Supp. 2d at 1014–15.

375. See *id.* at 1015.

376. See *id.*

377. See *id.*

378. See *id.* at 1016.

379. See *id.*

380. 615 F.3d 1204 (9th Cir. 2010).

381. A petition for certiorari was filed on January 24, 2011. Petition for Writ of Certiorari, *CompuCredit Corp. v. Greenwood*, 615 F.3d 1204 (9th Cir. 2010) (No. 10-948).

382. See *Greenwood*, 615 F.3d at 1205.

383. See *id.*

384. See *id.*

385. See *Greenwood v. CompuCredit Corp.*, 617 F. Supp. 2d 980, 988 (N.D. Cal. 2009).



The Ninth Circuit affirmed.<sup>386</sup> Like the court in *Alexander*, the Ninth Circuit found that the CROA's required disclosures provision establishes four rights made unwaivable by the anti-waiver provision of the statute.<sup>387</sup> The court looked to the established definitions used by the *Alexander* court to highlight the differences between arbitration and a civil action.<sup>388</sup> Credit Providers argued that because the "right to sue" language is contained only in the disclosure section of the statute, it does not create a separate right.<sup>389</sup> Unconvinced, the court asserted that Congress did not intend to require credit repair organizations "to misinform consumers about a fictional right."<sup>390</sup>

Credit Providers also argued that because the anti-waiver provision states that a waiver cannot be enforced "by any Federal or State court or any other person," Congress intended for arbitrators to hear CROA claims.<sup>391</sup> The court rejected this argument and stated that this language speaks to a situation in which an organization proceeds against a consumer in arbitration, at which point the consumer would retain these rights in the process of the arbitration.<sup>392</sup> The court also pointed to the numerous usages of the word "courts" in the statute, which it interpreted as emphasizing the intended vital role of courts in CROA claims.<sup>393</sup>

Acknowledging the circuit split its decision created, the court stated that it was "unpersuaded" by the reasoning of its sister circuits.<sup>394</sup> The court described the holdings of the Third and Eleventh Circuits as unfairly disregarding the "right to sue" provision, and rejected the analogies to Supreme Court precedent in favor of arbitration.<sup>395</sup>

In dissent, Circuit Judge A. Wallace Tashima argued that nothing in the CROA evinces an intent to void arbitration agreements.<sup>396</sup> Judge Tashima argued that the "right to sue" language simply establishes what must be communicated to consumers, and does not create a substantive right.<sup>397</sup> Additionally, Judge Tashima found instructive the fact that each of the rights stated alongside the right to sue in section 1679c is separately stated elsewhere in the statute, showing that Congress included the disclosure provision simply to ensure the disclosure of rights that are then granted

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386. See *Greenwood*, 615 F.3d at 1205 ("We conclude that Congress meant what it said in using the term 'sue,' and that it did not mean 'arbitrate.'").

387. See *id.* at 1207.

388. See *id.* at 1208; see also *supra* note 369 and accompanying text.

389. *Greenwood*, 615 F.3d at 1209.

390. See *id.*

391. See *id.* at 1208; see also Brief of Appellant at 19, *Greenwood*, 615 F.3d 1204 (9th Cir. 2010) (No. 09-15906) ("[B]y including 'or any other person' in the same sentence that addresses Federal and State courts, Congress acknowledged that arbitrators . . . may decide CROA claims.").

392. See *Greenwood*, 615 F.3d at 1208.

393. See *id.* at 1211.

394. *Id.* at 1211.

395. See *id.* at 1211–14.

396. See *id.* at 1214 (Tashima, J., dissenting).

397. See *id.* at 1215.

elsewhere.<sup>398</sup> Judge Tashima argued that the civil liability provision in section 1679g corresponds to the “right to sue” language and provides consumers with a right of action that is not required to be enforced anywhere in the CROA.<sup>399</sup> Furthermore, Judge Tashima argued that because section 1679c(a) only requires written disclosures but creates no substantive rights, that provision could not be the basis of an unwaivable right.<sup>400</sup> Judge Tashima also endorsed the defense’s argument based on the “any other person” language, finding that this language reveals Congress’s acknowledgement that third parties such as arbitrators may decide such cases.<sup>401</sup>

Finally, Judge Tashima expressed disagreement with the majority’s reliance on the word “courts,” finding that such word choice merely indicates that questions of civil liability will ordinarily be resolved in a judicial forum.<sup>402</sup> Pointing to the lack of both an inherent conflict and any dispositive legislative history, Judge Tashima cautioned against eschewing the holdings of the Third and Eleventh Circuits and endorsed the view that CROA claims are arbitrable.<sup>403</sup>

### 3. Against Enforceability

Those courts that disallow arbitration of CROA claims reinforce the theories of a number of scholars who advocate for a blanket prohibition of mandatory arbitration provisions in any agreement with a consumer.<sup>404</sup> Consumer protection advocates consistently argue that pre-dispute arbitration agreements are harmful to consumers.<sup>405</sup> Additionally, supporters of this viewpoint contend that arbitration, and the FAA in general, was intended only to be used by businesses with equal bargaining power, and that consumer arbitration agreements should not be enforced pursuant to the FAA as it is currently written.<sup>406</sup>

In support of the opinion that mandatory arbitration of consumer disputes should not be enforced, proposed legislation recommends a broad

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398. *See id.*

399. *See id.* at 1215–16.

400. *See id.*

401. *See id.*; *see also supra* note 391 and accompanying text.

402. *See Greenwood*, 615 F.3d at 1216 (Tashima, J., dissenting).

403. *Id.* at 1216 (“We should not lightly create a circuit split on an issue of national application on the basis of the flimsy evidence on which the majority relies.”).

404. *See Sternlight, supra* note 18, at 1674–75 (finding that mandatory arbitration clauses inserted by businesses into agreements with consumers, patients, students, and employees are inherently unjust); Van Wezel Stone, *supra* note 200, at 936 (“[T]he Supreme Court’s expansive doctrines, when applied to consumer transactions, contravene the statute’s intent and undermine many important due process and substantive rights.”).

405. *See Sternlight, supra* note 205, at 679 (“[E]ven assuming . . . that arbitration is cheaper, quicker, and even better for society as a whole, it may still not serve the interests of all parties. Some could argue that a system of slavery would be more efficient for society as a whole, but that certainly does not mean that the system would be just or fair to the slaves.”).

406. *See generally* Feingold, *supra* note 18.

transformation in federal arbitration law.<sup>407</sup> These proposals include eliminating the use of mandatory arbitration in consumer lending and credit card agreements,<sup>408</sup> requiring arbitration agreements to meet certain criteria in order to be enforceable,<sup>409</sup> and granting the power to regulate consumer arbitration to states.<sup>410</sup> Advocates of these bills, or of any federal legislation limiting arbitration in the consumer context, vehemently contend that arbitration unfairly deprives consumers of inalienable rights and violates principles of democracy.<sup>411</sup>

This opposition to arbitration has resulted in a transformation of the treatment of mandatory consumer arbitration clauses in practice. Banks and arbitration associations have retreated from the approach of full enforcement previously in effect. For example, in July 2009, JP Morgan Chase announced that it would cease filing new arbitration claims and may stop including arbitration agreements in contracts altogether.<sup>412</sup> In August 2009, Bank of America decided that credit card holders could bring claims in court even if they have previously signed a contract containing an arbitration agreement.<sup>413</sup> Similarly, the American Arbitration Association (AAA) has decided to stop hearing consumer debt collection claims pursuant to pre-dispute arbitration agreements.<sup>414</sup> Likewise, the National Arbitration Forum (NAF) has decided to stop hearing cases arising from arbitration agreements in consumer contracts following the settlement of a

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407. See Sternlight, *supra* note 127, at 178–82 (“For those who oppose the use of mandatory arbitration in the consumer context it is clear that federal legislation is the most powerful tool by which such arbitration might be eliminated or regulated.”).

408. See 146 CONG. REC. 1722–24 (2000); *see also* 155 CONG. REC. 4897–99 (2009) (the 2009 version of Senator Feingold’s proposed Arbitration Fairness Act).

409. See 146 CONG. REC. 22,861–65 (2000).

410. See Sternlight, *supra* note 127, at 181.

411. See Alderman, *supra* note 17, at 152–54; Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267, 313–29 (1995); David S. Schwartz, *Enforcing Small Print To Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 125–28; Smith, *supra* note 18, at 1222 (“Mandatory arbitration effectively strips consumers of their rights to protect themselves from large corporations and jeopardizes the American judicial process of developing common law.”); Sternlight, *supra* note 18, at 1661–65.

412. See Ashby Jones, *The Revolution Rolls On: JP Morgan Chase Suspends Arbitration Activity*, WALL ST. J. L. BLOG (July 24, 2009, 12:00 PM), <http://blogs.wsj.com/law/2009/07/24/the-revolution-rolls-on-jpmorgan-chase-suspends-arbitration-activity/>.

413. See Kathy Chu, *Bank of America Ends Arbitration of Credit Card Disputes*, U.S.A. TODAY (August 13, 2009, 11:29 PM), [http://www.usatoday.com/money/industries/banking/2009-08-13-bank-of-america-no-arbitration\\_N.htm](http://www.usatoday.com/money/industries/banking/2009-08-13-bank-of-america-no-arbitration_N.htm); Jonathan Stempel, *Bank of America Ends Arbitration of Card Disputes*, REUTERS (Aug 14, 2009, 8:59 AM), <http://www.reuters.com/article/idUSTRE57D03E20090814>.

414. See Robin Sidel & Amol Sharma, *Credit Card Disputes Tossed Into Disarray*, WALL ST. J., July 22, 2009, at A1 (announcing the American Arbitration Association’s (AAA) decision to stop hearing disputes involving consumers and their credit card and cell phone companies).

lawsuit brought by the Minnesota Attorney General stemming from the company's connection to a major debt collection enterprise.<sup>415</sup>

#### IV. WHY COURTS SHOULD FIND THAT THE CROA DOES NOT PRECLUDE ARBITRATION

Parts I and II of this Note outlined the legal and theoretical foundations of the CROA and the FAA. Part III examined the different ways courts have resolved a purported clash between the two statutes. This part discusses why courts should continue to enforce arbitration agreements under the CROA. First, it considers the importance of stare decisis in relation to this particular conflict. Next, it addresses the concerns of those advocating for the prohibition of mandatory consumer arbitration agreements by examining consumer protection provided by mechanisms other than litigation. Finally, this part suggests an alternative method to solve the current dispute by simply outlawing the operation of credit repair organizations.

##### A. Lower Courts Should Uphold the Supreme Court's Strongly Expressed Policy in Favor of Arbitration

The Supreme Court's predilection for arbitration is unambiguous.<sup>416</sup> As recently as June 2010, the Supreme Court endowed arbitrators with increased power and autonomy over the process of arbitration.<sup>417</sup> Such decisions reflect a clear endorsement of the benefits of arbitration.<sup>418</sup> That the Supreme Court has consistently upheld arbitration agreements and continued to rely on the efficacy of arbitration for the past thirty years<sup>419</sup> reflects a determination by the Court that any problems inherent in arbitration pose little threat to the democratic process.

Relatedly, the Supreme Court's recent decision overturning the holding of three esteemed arbitrators<sup>420</sup> indicates that while arbitration is valued as

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415. See Carrick Mollenkamp, Dionne Searcy & Nathan Koppel, *Turmoil in Arbitration Empire Upends Credit Card Disputes*, WALL ST. J., Oct. 15, 2009, at A1.

416. See Carbonneau, *Revolution*, *supra* note 19, at 238 ("At every stage of arbitration's ascendancy, the Court has provided the necessary doctrinal pronouncements and political muscle to confirm the gains achieved and to advance the process to the next level of its reformation."); see also Brief for DRI—The Voice of the Defense Bar as Amicus Curiae Supporting Petitioners at 9, *CompuCredit Corp. v. Greenwood*, 615 F.3d 1204 (9th Cir. 2010) (No. 10-948) ("[The Ninth Circuit's] approach to arbitrability not only threatens thousands of arbitration agreements; it is flatly contrary to the pro-arbitration policy embodied in the FAA and this Court's previous decisions.").

417. See *supra* notes 242–48 and accompanying text.

418. See *Rent-a-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010) ("The FAA . . . places arbitration agreements on an equal footing with other contracts . . . and requires courts to enforce them according to their terms."); see also *supra* notes 242–48 and accompanying text.

419. See *supra* Part II.C.

420. See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1770 (2010) ("[I]nstead of identifying and applying a rule of decision . . . the arbitration panel imposed its

an alternative means for the vindication of legal rights, the Court retains a significant amount of control over arbitration awards to ensure that individual rights are protected.<sup>421</sup> While several scholars have argued that mandatory consumer arbitration unfairly circumvents the judicial process,<sup>422</sup> the vacatur of the award in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*<sup>423</sup> shows that judicial review of arbitration awards remains a meaningful and viable channel. This decision demonstrates that while the Court has afforded arbitration a great deal of deference, arbitration has not become a practice that is allowed to proceed unchecked and without the trappings of due process.<sup>424</sup>

Likewise, in the years since the passage of the FAA in 1925, the Supreme Court has never interpreted a federal statute to preclude arbitration, with the exception of labor statutes negotiated by a union.<sup>425</sup> Undoubtedly, the Court's finding in *Mitsubishi*,<sup>426</sup> that arbitration fully protects the statutory rights of participants, has endured and remained applicable for thirty years.<sup>427</sup> Adherence to the Court's policy in favor of arbitration of statutory claims is even more merited when considering the longstanding principle that stare decisis is more strictly adhered to when interpreting federal statutes than in other contexts.<sup>428</sup> Because this principle acknowledges Congress's ability to reverse a Court's decision to allow arbitration of statutory claims, the fact that neither the FAA nor the numerous statutes under which arbitration has been compelled have been revised reflects Congress's support for the Court's allowance of arbitration under these statutes.<sup>429</sup>

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own policy choice and thus exceeded its powers."); see also *supra* notes 249–55 and accompanying text.

421. See *supra* notes 249–57 and accompanying text.

422. See *supra* note 411 and accompanying text.

423. 130 S. Ct. 1758, 1770 (2010).

424. See Carbonneau, *Revolution*, *supra* note 19, at 266 ("Lawyers provide the hands-on supervision as counsel and advocates, while courts peer remotely into the process from a respectful distance.").

425. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48–49 (1974) (holding that Title VII sought to enhance and not reduce a claimant's possibilities for redress); see also Sternlight, *supra* note 205, at 672; *supra* note 190.

426. See *supra* notes 191–96 and accompanying text.

427. See CARBONNEAU, *supra* note 151, at 271 ("There are few, if any, federal statutes or rights that result in a judicial determination of inarbitrability. The courts favor arbitration too greatly to find that statutory regulations should prohibit recourse to the process.").

428. See *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977) ("[C]onsiderations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation.").

429. See CARBONNEAU, *supra* note 151, at 231 (discussing how claims arising under regulatory laws governing commercial conduct and federal statutes that create individual rights and implicate civil rights legislation and individual liberties have been submitted to arbitration); see also Speidel, *supra* note 19, at 1081 ("In the absence of a clear congressional decision that the statutory claim is not suitable for arbitration, the Court has stated that the nature of the claim is irrelevant because adjudication is simply shifted from a court to an arbitral forum that is capable of deciding the claims.").

In addition to stare decisis concerns, courts should not refuse to enforce arbitration agreements under the CROA because there is little proof that the arbitration process truly causes consumers any detriment that they would not otherwise endure in the litigation process.<sup>430</sup> While some argue that mandatory arbitration favors large companies,<sup>431</sup> the record-setting award against Goldman Sachs upheld by a federal judge in November 2010 tends to discredit this argument.<sup>432</sup> The award, one of the largest arbitration awards ever granted, suggests that mandatory arbitration is not as unfavorable to the “little guys” as many argue.<sup>433</sup> Additionally, the choice of arbitration provides some benefits to consumers, the deprivation of which may lead to higher costs of services.<sup>434</sup>

### *B. Consumer Protection Is Supplied by Alternative Channels*

Courts should enforce arbitration agreements pursuant to current policy and judicial precedent because the inequities cited by those who oppose mandatory consumer arbitration may be prevented through alternative means. Due to developments in consumer protection law as well as recent changes in the way banks and arbitration associations handle contracts, consumers may be protected from unfair arbitration agreements by methods other than judicial determinations denying arbitration.<sup>435</sup>

#### 1. Institutions Reject Arbitration Agreements

By discontinuing the use of arbitration clauses in consumer contracts, Bank of America and JP Morgan Chase have narrowed the number of scenarios in which arbitration agreements will be compelled.<sup>436</sup> In the event that credit repair organizations do not similarly terminate usage of arbitration clauses in consumer agreements, however, the decision of two major arbitration associations to stop hearing cases arising out of mandatory consumer arbitration clauses has reduced the possibility that arbitration of CROA claims can effectively be compelled.<sup>437</sup> Without the services of

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430. See Carbonneau, *Triumph*, *supra* note 19, at 397 (“Arbitration embodies a trial process grounded in common sense, flexibility, and an ethic of problem-solving. . . . In other words, arbitration personifies due process and justice.”).

431. See Sternlight, *supra* note 205, at 680–96.

432. See *supra* notes 260–61 and accompanying text.

433. See *id.*; see also Sternlight, *supra* note 205, at 637. Sternlight’s thesis rests on the idea that arbitration is inherently unfair to consumers and that courts have inadequately protected consumers from these agreements. *Id.*; see also Brief for DRI, *supra* note 416, at 6 (“[C]onsumers prevailed in 55 percent of the consumer-initiated cases that reached decision. . . . Another study found that consumers prevailed in consumer-initiated cases 65.5 percent of the time.” (internal citations omitted)).

434. See Ware, *supra* note 355, at 213 (“[T]he consumer’s right to government adjudication is alienable. This empowers any and all consumers to get consideration for that right.”).

435. See *supra* notes 412–15 and accompanying text.

436. See *supra* notes 412–13 and accompanying text.

437. See *supra* notes 414–15 and accompanying text.

these two major arbitration services, a courtroom may be the only forum available to hear these cases.

Modification of the policies of these institutions reflects a shift in the legal community's attitude about consumer arbitration agreements. While this change seems to reflect pressure from consumer groups rather than disapproval for arbitration on the part of the institutions themselves,<sup>438</sup> the shift in policy indicates that regardless of whether mandatory arbitration of consumer agreements harms consumers, overturning a longstanding policy of the Supreme Court is not the sole method by which these agreements may be avoided.

## 2. The Legislative Branch Seeks To Modify Arbitration

In addition to protection from the banking and arbitration communities, the legislative branch has made steps toward increased consumer protection in the realm of arbitration.<sup>439</sup> The numerous statutes that have been proposed in support of prohibiting mandatory arbitration of consumer contract disputes in the past few years suggest an imminent change to arbitration policy in the legislature.<sup>440</sup> Recently, the Arbitration Fairness Act was reintroduced in Congress.<sup>441</sup> The proposed statute would prohibit pre-dispute binding arbitration clauses in consumer and employment contracts.<sup>442</sup> Additionally, former Senator Russell Feingold, the sponsor of the bill, has suggested an arbitration bill of rights should a legislative prohibition prove too sweeping.<sup>443</sup> Similarly, several scholars have suggested amendments to the FAA limiting the use of mandatory consumer arbitration agreements.<sup>444</sup> Should legislative modifications be made, courts may continue to enforce arbitration agreements that remain within the new restrictions, and parties may continue to use arbitration in those areas of dispute resolution where it provides a valuable function.

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438. See Stempel, *supra* note 413 (quoting a Bank of America spokeswoman as saying, "While the bank thinks arbitration is a very fair way to go, customers do not").

439. See *supra* notes 407–10 and accompanying text.

440. See *supra* notes 407–10 and accompanying text.

441. See *supra* notes 407–10 and accompanying text.

442. See *supra* note 408.

443. See Feingold, *supra* note 18, at 298 (suggesting a cap on filing fees and costs, a limited right to discovery, and a requirement that arbitrators explain the reasoning behind decisions).

444. See, e.g., Sternlight, *supra* note 127, at 375 app. C (proposing that contracts between consumers and companies that "deny the consumer access to courts that would otherwise be available to the consumer to enforce legal claims" be invalidated); see also Speidel, *supra* note 19, at 1093–94 (proposing a "Federal Consumer Arbitration Act" that would invalidate arbitration agreements in adhesion contracts unless there is a clear disclosure of the agreement to arbitrate that explicitly informs the consumer that statutory rights will be included in the agreement to arbitrate. The act would also require the arbitrator to issue a written opinion explaining any decision based on statutory rights).

### 3. A New Agency Reconsiders Arbitration

The Dodd-Frank Act specifically requires the Consumer Financial Protection Agency to examine the use of mandatory pre-dispute arbitration agreements and to enact restrictions on the use of such clauses based on the study's results.<sup>445</sup> With this mandate, the Agency will be able to resolve the conflict over mandatory consumer arbitration and make targeted adjustments to the current law as needed.

#### *C. A Simple Solution: Outlaw Credit Repair Organizations*

A blanket prohibition against the practices of credit repair organizations would respect the policy in favor of arbitration and address concerns about consumer rights. The virtues of such organizations are few.<sup>446</sup> Statements of both legislators and former members of the credit repair industry reflect the organizations' lack of societal value and inherent potential for consumer harm.<sup>447</sup>

Georgia's state version of the CROA<sup>448</sup> prohibits the operation of credit repair organizations, in an acknowledgement of the few benefits and plentiful dangers that these clinics pose.<sup>449</sup> Several other states make CROA violations a felony.<sup>450</sup> It is doubtful that similar action on the part of Congress would deprive the economy of a vital entity. Considering the continued violations of credit repair organizations despite the passage of the CROA,<sup>451</sup> a blanket prohibition against these agencies or an increase in the severity of the penalties these agencies face for violations would provide consumers with far greater protection than would simply prohibiting CROA claims from arbitration.

### CONCLUSION

The Credit Repair Organizations Act is vague in its discussion of rights to a judicial forum, causing confusion among consumers and credit repair agencies alike. While a Supreme Court holding that the CROA precludes arbitration may nominally protect consumers, such a holding would ultimately weaken arbitration's effectiveness as a form of alternative dispute resolution.

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445. See *supra* notes 265–68 and accompanying text.

446. See *supra* notes 59, 65–67 and accompanying text.

447. See *supra* notes 66–67 and accompanying text.

448. See GA. CODE ANN. § 16-9-59 (2007); see also *supra* Part I.D.

449. See *Hearing, supra* note 67, at 9 (“The credit repair industry is big business, big business that can’t be done. It is legally impossible to change a credit rating unless a mistake has been made.”).

450. See *supra* note 100; see also Nathalie Martin, *1,000% Interest—Good While Supplies Last: A Study of Payday Loan Practices and Solutions*, 52 ARIZ. L. REV. 563, 592–93 n.154 (2010) (noting that Congress and states passed credit repair organizations legislation because “[m]ost of the credit repair agencies turned out to be scams, with some even offering to rent other people’s credit scores to borrowers for fees of \$2000 or more”).

451. See *supra* Part I.C.



An abrupt shift away from enforcement of arbitration agreements would throw years of Supreme Court jurisprudence into doubt.<sup>452</sup> The current upsurge in the usage of ADR methods originated because of significant problems with the court system, and arbitration's practicality has been affirmed by its current prevalence.<sup>453</sup> Because of arbitration's evident usefulness, courts should be hesitant to abandon the policy of deference to arbitration. To find that arbitration is precluded by a statute that articulates no clear prohibition of arbitration would drastically diminish the strength of arbitration as a fair and adequate process for conflict resolution in numerous other contexts. Whether or not enforcement of these provisions harms consumers, the solution should not involve turning decades of pro-arbitration Supreme Court jurisprudence on its head. Alternate channels exist to avoid the social costs that may accrue from the enforcement of mandatory arbitration clauses. A more effective method of consumer protection would be a wholesale ban on the operation of credit repair organizations. For these reasons, enforcing arbitration clauses in this context would do little to damage consumer protection and would allow courts to continue to respect arbitration agreements in other areas of the law.

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452. *See supra* Part II.C.

453. *See supra* Part II.C.5.